M'mucheke & another v Kumbuka (Environment and Land Appeal E008 of 2021) [2022] KEELC 2744 (KLR) (15 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2744 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E008 OF 2021

CK YANO, J

JULY 15, 2022

BETWEEN

KAMENE M'MUCHEKE ..... 1ST APPELLANT

JAPHET MUTURA ..... 2ND APPELLANT

AND

NCUGU IRIMBA KUMBUKA ..... RESPONDENT

(Being an appeal from the Judgement/Decree of the Chief Magistrate's Court at Marimanti by (Hon. P.N Maina CM) dated 19th August 2021 in Marimanti Environment and Land Case NO.7 OF 2019)

JUDGMENT

A. Introduction

1. The appellants Kamene M'Mucheke And Japhet Mutura filed this appeal against the judgement and decree of the Chief Magistrates Court Marimanti Case No 7 of 2019 (Hon PN Maina CM) delivered on August 19, 2021 and set forth the following 8 grounds of appeal:

    i. That the learned trial Magistrate erred in law and facts by holding that the respondent had proved her case on the balance of probabilities.

    ii. That the learned trial Magistrate erred in law and fact by holding that the respondent was in occupation and use of the suit land 3152 Kanjoro Adjudication Section when the respondent has never occupied or cultivated the said land.

    iii. That the Learned Trial Magistrate erred in Law and fact by failing to make a finding and hold that it was the appellants who were in actual occupation and use of the suit land LR 3152 Kanjoro Adjudication Section.

iv. That the Learned Trial Chief Magistrate erred in Law and fact by holding that the suit land LR 3152 Kanjoro Adjudication Section was not excised fraudulently from the appellant land parcel 1455 Kanjoro Adjudication Section when the truth is that the suit land was fraudulently excised from the appellant's other land parcel 3152 Kanjoro Adjudication Section.

v. That the learned trial magistrate erred in law and fact by failing to make a finding that the respondent has no building and neither and she ever cultivated the suit land consequently there was no way that legally and lawfully she could be adjudicated the suit land granted that under the *Land Adjudication Act* cap 284 individuals are adjudicated land parcels on portions that they have settled or cultivated.

vi. That the learned trial magistrates failed to consider the testimony of the 2nd defendant who despite testifying her evidence was not analyzed in the judgement.

vii. The learned trial magistrate erred in law and fact by failing to make observation and make a finding that while the appellants had their residence on 1455 Kanjoro Adjudication Section the appellants were cultivating and making use of parcel no 3152 Kanjoro Adjudication Section.

viii. That the evidence on record does not support the learned trial magistrate's judgement.

2. The appellants pray for orders that:

a) The appeal be allowed

b) The judgement of the learned trial magistrate PN MAINA (MR) CM dated August 19, 2021 be set aside.

c) That the judgement of the trial Magistrate PN MAINA (MR) CM be substituted with an order of this court Declaring the suit land 3152 Kanjoro Adjudication Section as the property of the appellants.

d.) Costs of this appeal and the proceeding in the lower court be borne by the respondent.

B. Background Of The Appeal

3. The gist of the case in a nutshell is that by the plaint dated May 22, 2019 the respondent sought an order of permanent injunction restraining the appellants from entering, trespassing, moving into, seeking to occupy, alienating and/or in any other manner whatsoever from interfering with the respondent's rights of ownership, possession, occupation and use of Land Parcel No 3152/Kanjoro Adjudication Section. The respondent pleaded that at all material times relevant to the suit, she was and still the owner of all parcel of land referenced to as Land Parcel No 3152/Kanjoro Adjudication Section within Tharaka Nithi County. The respondent further pleaded that the said land was ancestral land which she inherited from her father CIAMBATUKU and that during the demarcation and adjudication process, the said parcel of land was recorded in her name.

4. The respondent contended that during the said demarcation and adjudication process, the 1st Appellant was recorded as the owner of a separate parcel of land referred as Land Parcel No 1455/ Kanjoro Adjudication Section while the 2nd appellant did not have any land recorded in his name. The respondent stated that the appellants did not lodge any objection to the Land Adjudication Committee as required by Law or before any organ established by the *Land Adjudication Act*. The respondent further stated that on numerous occasions prior to and after recording of the respondent as the owner of Land Parcel No 3152/Kanjoro Adjudication Section, the 1st and 2nd appellants unlawfully and without just cause trespassed upon the respondent's suit land by use of force threatening to harm

the respondent and that the appellants had by their conduct denied the respondent quiet use and enjoyment of the suit land hence making the suit necessary.

5. In that regard in the plaint the respondent prayed for an order of permanent injunction plus costs of the suit.

6. The Appellants filed a statement of defence and counterclaim dated June 24, 2019 denying the allegations in the plaint. The appellants averred that the 1st Appellant was the legitimate owner of Land Parcel No 1455 Kanjoro Adjudication Section having acquired the said land from her late father who occupied and used the same. That the said parcel was ancestral land on which the appellants had lived on for over 40 years and had no other place to call home.

7. The appellants averred that the respondent had never owned any land in the area, and that he only colluded with the adjudication officers who awarded him a portion of land out of the 1st appellant's land parcel No 1455. It was the appellants contention that the respondent's registration of parcel No 3152 was irregular and unprocedural.

8. In their counterclaim, the appellants averred that in or about the year 2017, the Respondent in collusion with Adjudication Officers alienated the appellants Land Parcel No 1455 Kanjoro Adjudication Section, and that without the prior consent and/or authority of the appellants, the respondent was awarded Land Parcel No 3152 out of the appellants' portion. The 1st appellant stated that the Respondent never laid any claim to the land, and further that the parties did not go through the various stages of objections and dispute resolution set out in the *Land Adjudication Act* which culminated in the decision of awarding the respondent Land Parcel No 3152 out of the appellants portion. The Appellants in their counterclaim prayed for an order of permanent injunction restraining the respondent from inter alia, claiming ownership or in any other manner interfering with the appellants quiet occupation and use of Land Parcel No 1455 Kanjoro Adjudication Section. They also prayed for costs of the counter claim.

9. After hearing evidence from the respondent and the appellants, the trial court delivered a judgement dated August 19, 2021 in favour of the respondent and the appellants were dissatisfied with the said judgement which triggered this appeal.

10. The appeal was canvassed by way of written submissions which were duly filed by both parties. The appellants filed their submissions on June 6, 2022 while the Respondent filed on March 2, 2022.

The Appellants' Submissions

11. In their submissions, the appellants contended that from the evidence tendered in the trial court, it was clear that the main issue in dispute arose from Land parcel No 3152 which they claimed was created from parcel No 1455. The appellants contended that they were cultivating parcel No 3152.

12. The appellants submitted that the onus of proving trespass was on the respondent who was making allegation of trespass and that the respondent failed to prove her case on a balance of probabilities.

13. The appellants argued on grounds 2,3,5 and 7 together on whether the honorable magistrate erred in law and in fact in holding that the respondent was in occupation of the suit land when the respondent had never occupied or cultivated the suit land.

14. The appellants submitted that they were using the suit land for cultivation and that the respondent neither cultivated nor had any building on the land hence there was no way she could be adjudicated the suit land given that individuals are adjudicated parcels of land on portions that they have settled on or cultivated under the *Land Adjudication Act*.

15. With regard to ground 4 the appellants submitted that the 1st appellant in her statement stated that in or about the year 2017 the respondent in collusion with the adjudication officers alienated her land parcel No 1455 Kanjoro Adjudication Section without her consent or authority and that the respondent was awarded land parcel no 3152 Kanjoro Adjudication Section out of the 1st appellant's portion.

16. The appellants submitted that the respondent never laid claim nor go through the various stages of objections and dispute resolution as set out in *Land Adjudication Act* which culminated in the decision of awarding the respondent parcel No 3152/Kanjoro Adjudication Section.

17. The appellants' contention was that that their evidence was that they had been using the suit land and that the same was ancestral land given to the 1st appellant by her late father one M'MUCHEGE MAIKITHE

18. The appellants submitted that the respondent failed to explain how the suit land was adjudicated to her in the year 2017 yet the appellants had been using the land since the death of the 1st appellant's father.

19. The appellants submitted that the trial court erred in finding that the respondent had proved her case on balance of probability and prayed that this court finds that the appeal is merited and allow it.

C. The Respondent's Submissions

20. With regard to the appellants argument that the trial magistrate erred in holding that the respondent had proved her case, the respondent submitted that she adduced before the trial court sufficient evidence in support of her case for trespass against the appellants and the trial court was right in finding that the respondent had established her case on a balance of probabilities. It was further submitted that the respondent adduced sufficient evidence to prove that Land Parcel No 3152 Kanjoro Adjudication Section belonged to her and that the appellants had trespassed on it.

21. The respondent submitted that in support of her claim of ownership of land parcel 3152/Kanjoro Adjudication Section, she adduced before court as Exhibit 1,a copy of the adjudication record book showing that on the July 6, 2017, she was recorded by the demarcation officer as the owner of the land parcel 3152/Kanjoro Adjudication Section and that, there were a series of disputes that had been determined by the area chief and the land committee between the 1st appellant and the respondent over the suit land.

22. The respondent added that the land committee heard the dispute as per section 6 of the *Land Adjudication Act* and the proceedings were produced as respondent's exhibit 8 and that the demarcation officer demarcated the boundary as per section 15 of the *Land Adjudication Act* and in accordance with the decision of the committee and drew a sketch map which was also tendered as respondent's Exhibit 2.

23. The respondent further stated that on the issue of trespass to the suit land, the Appellants did not deny trespassing on the respondent's land parcel 3152/Kanjoro Adjudication section. The respondent referred to the proceedings of the trial court at pages 87-92 of the record of the appeal, and submitted that the appellants admitted on cross examination that she cultivated on the land that the respondent claimed to be hers.

24. The respondent contends that the adjudication officer filed a report dated October 21, 2020 pursuant to the court's order to visit the land and fix the boundaries and that in the report it was confirmed by the adjudication officer that the appellants had interfered with the boundary fixtures.

25. The respondent further submitted that the appellants filed their statement of defence and counterclaim dated the June 24, 2019 wherein they sought permanent order of injunction against the respondent restraining her from interfering with land parcel 1455/Kanjoro Adjudication Section, but did not plead that the respondent had trespassed on the land parcel 1455/Kanjaro Adjudication section and that the prayer for a permanent injunction in respect of land parcel 1455/Kanjaro Adjudication Section was therefore unfounded.

26. It was submitted inter alia that the respondent adduced sufficient evidence to prove that land parcel 3152/Kanjoro Adjudication Section belonged to her and that the appellants had trespassed on her land and therefore there was no error on the part of the learned magistrate to find that the respondent had established her case on a balance of probabilities.

27. The respondent submitted on grounds 2,3 and 7 together since they relate to occupation of the suit land parcel 3152/Kanjoro Adjudication Section and the respondent submitted that there is evidence on record to show that the respondent has long been in possession and occupation of land parcel 3152/Kanjoro Adjudication Section and that there have been a series of disputes arbitrated by the area chief and land committee.

28. The respondent submitted that she called PW2 CHARLES MAJIRA, a neighbour who testified that the respondent inherited her land from her father while the appellants also inherited from their father and that the two parcels of land share a common boundary. That PW2 testified that the respondent had been living on the land with her family and after the death of her father and brothers, the respondent was left on the suit land and the appellants later started trespassing on the land and laying claim over the land.

29. The respondent further submitted that the appellants did not in their defence and counterclaim deny the respondent's occupation of the land parcel 3152/Kanjoro Adjudication Section neither did they claim that they were in occupation thereof. The respondent averred that the appellants claimed to own and occupy land parcel number 1455/Kanjoro Adjudication Section.

30. The respondent submitted that their claim against the appellants was for trespass to land parcel number 3152/Kanjaro Adjudication Section and that she had already established to the required standard that land parcel 3152/Kanjaro Adjudication Section belonged to her and that any such occupation by the appellants was illegal and unlawful and amounts to trespass. The respondent urged the Honourable Court to find that the trial court was right in finding that the suit land parcel number 3152/Kanjoro Adjudication belonged to her and that she was in possession and occupation thereof.

31. With regard to grounds 4 & 5 on whether the respondent's acquisition of land parcel 3152/Kanjaro Adjudication Section was fraudulent, illegal and unlawful, the respondent submitted that the appellants wrongly faulted the trial magistrate for holding that the suit land parcel was not excised fraudulently from the appellant's land parcel 1455 when the truth is that the said land was fraudulently excised from the appellant's other land parcel 3152/Kanjaro Adjudication Section.

32. The respondent submitted that these grounds of appeal are self-contradictory, ambiguous and unintelligible and urged the Honourable Court to strike it out and disregard it. The Respondent contended that in the first instance, the appellants appear to mean that land parcel 3152/Kanjoro Adjudication Section was fraudulently excised from land parcel 1455/Kanjoro Adjudication Section and the trial court erred in not holding so and on the other hand the appellant's state that the suit land was excised from land parcel 3152/Kanjoro Adjudication Section. It was the Respondent's submissions that the appellants cannot take the two stands.

33. The respondent further submitted inter alia that that the appellants did not establish a case for fraud against the respondent and that the appellants did not in their counter-claim plead fraud against the respondent. The respondent cited order 2 rule 10 (1) (a) of the *Civil Procedure Rules* which requires allegations of fraud and the particulars thereof to be specifically pleaded. It provides;

> " (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;"

34. The respondent has relied on the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where the Court of Appeal held;

> " It is trite law that any allegation of fraud must be pleaded and strictly proved...in cases where fraud is alleged, it is not enough to simply infer fraud from the facts..."

35. The respondent submitted that in the instant case, the appellants did not plead fraud and set out the particulars thereof in their statement of defence. Further, that they did not file a counter-claim for fraud against the respondent despite being aware that the land is registered in the name of the respondent. The respondent contended that the appellants were bound by the averments contained in their statement of defence and counter-claim, and that the trial court could not simply infer fraud from the facts.

36. The respondent further stated that whereas the appellants faulted the trial magistrate for failing to find that the respondent had no building on and neither had she ever cultivated the suit land consequently there was no way that legally and lawfully could she be adjudicated the suit land given that under the *Land Adjudication Act* cap 284 individuals are adjudicated land parcels on portions that they have settled or cultivated, the respondent submitted that the *Land Adjudication Act* is a self-contained statute which provides a dispute resolution mechanism for those aggrieved by any decision or action taken under the Act. The respondent specifically cited the preamble and sections 26 and 29 of the said Act.

37. The respondent submitted that section 26 is one way in which a party can challenge the correctness or completeness of an adjudication register; by filing an objection to the Adjudication officer in writing and the adjudication officer determines the objection. That where a party is aggrieved by the decision of the adjudication officer, they are then required to file an appeal with the Minister and the decision of the Minister in the appeal is final.

38. The respondent submitted inter alia that the 1st appellant appears to have been aggrieved by the recording of the respondent as the owner of land parcel number 3152/Kanjoro Adjudication Section and that it is clear that the 1st appellant considered the adjudication process to be flawed and the adjudication register of land parcel number 3152 to be incorrect. The respondent submitted that under the provisions of the said Act, as an aggrieved party claiming an interest in the suit land, the 1st appellant was required to file an objection with the adjudication officer of Kanjoro Adjudication Section so that the adjudication officer could determine and ascertain the rights and interest thereof.

39. The respondent has relied on the case of *Adballah Mangi Mohammed v Lazarus & 5 Others* [2012] eKLR which was cited with approval in *Nicholus Mugambi & Another (suing as the legal representatives of the Estate of Peter Etharia M'Kailibi) & 4 Others v Zachary Baariu & 6 Others* [2018] eKLR that:

> " Where there is a dispute as to the applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property".

40. The respondent submitted that there is no evidence on record to show that the 1st appellant filed an objection with the adjudication officer under section 26 of the Act to challenge the correctness of the register of the suit land, or that she finally proffered an appeal to the minister under section 29 of the Act. The respondent further submitted that the question of ownership having been determined by an organ authorized by law to do so under the *Land Adjudication Act*, that decision could not be challenged by way of an ordinary suit and that if the appellants felt aggrieved by the decision to award land parcel 3152 in Kanjoro Adjudication Section to the respondent, then they should have followed the dispute resolution mechanism stipulated under the Act, or move the High Court by way of judicial review under the provisions of the *Law Reform Act* and the *Civil Procedure Rules* 2010.

41. The respondent submitted that the attempt to challenge the award of the land to the respondent in the respondent's suit for trespass was untenable in law and that once parties' rights of ownership are determined by the organs set out in the *Land Adjudication Act*, a party to that dispute, in whose favour the dispute has been resolved, can approach a court of law for injunction orders, which are protective orders against an aggressor or trespasser upon land, as the tribunals set out in the Act cannot give the relief. It was submitted that the ownership of the suit land parcel 3152/Kanjoro Adjudication Section was fairly confirmed to the respondent and that she was entitled to file a claim for trespass against the appellants. That the trial court was therefore right in granting injunctive orders against the appellants.

42. The respondents contend that the futility of the appellants' claim is further discernible by the fact that the appellants did not in their statement of defence and counter-claim seek a declaration that the respondent's suit land parcel number 3152/Kanjoro Adjudication Section belongs to them. That they also did not seek a declaration that land parcel number 3152/Kanjoro Adjudication Section had been fraudulently excised from land parcel number 1455.

43. The respondent submitted that a court can only grant what has been prayed for and has relied on the decision in *Erastus Kihara Mureithi v Josphat Njoroge Ragi & 2 Others* [2011] eKLR to wit;

> " The second answer to the question whether the applicant can be compelled to give funds to the Chamuka Dispensary on priority, lies in the fact that this order did not constitute part of the prayers for contempt of court...It is an elementary rule of both substantive and procedural law that only prayers sought may be granted or as the case may be, denied. This prayer was not sought or, prayed for in the notice of motion, and could not be conjured up by the court. This observation equally applies to the order that the "plaintiff committee continues in office with their work to conclusion".

44. The respondent has also cited the holding in *Alex Gichira Mwatha v Joshua M Maina* [2016] eKLR, where the court opined:

> " Secondly the appellant did not seek any relief in his prayers before the trial court on account of the alleged damages which were not ascertained in the pleadings. It is correct therefore for the respondent to term this appeal as a non-starter because the appellant cannot fault the

decision of the trial court for not granting what was not prayed for in the first place. A trial court cannot make assumptions on the reliefs being sought. It has to be moved specifically to grant a certain relief..."

45. With regard to the appellants' complaint that the learned trial magistrate failed to consider the testimony of the 2nd appellant the respondent submitted that the trial court clearly analyzed the evidence of the 2nd appellant, and referred the court to pages 90 to 93 of the record of appeal as well as page 4 of the judgment.

The respondent submitted that the trial court throughout its judgement made reference to the evidence adduced by the parties towards proving their case. The respondent urged the court to find that the trial court sufficiently analyzed the evidence of all the parties including that of the 2nd appellant and their witnesses and was right in finding that the appellants did not prove their defence and counter-claim against the respondent. The respondent submitted that this appeal lacks merit and urged the court to dismiss it with costs to the respondent.

D. Analysis And Determination

46. I have given due consideration to the rival submissions and the applicable provisions of the law cited by the parties. This being a first Appeal, the mandate of this Court as enunciated in the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) E.A. 123* is to review the record and reconsider the evidence which was before the lower Court, evaluate the same and draw its conclusions giving due allowance for the fact that it neither saw nor heard the witness(es). In the case of *Ogeto Vs Republic* [2004] eKLR, the court rehashed the duty of an appellate Court in the following terms: -

"1. On a first appeal, the court has a duty to reconsider the evidence which was before the lower court, evaluate the evidence and draw its conclusion giving due allowance for the fact that it has neither seen nor heard the witness.

2. A Court of Appeal 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 trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision....."

47. Having laid the principles guiding this appeal, I now proceed to determine the matter. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

i. Whether the trial magistrate failed to consider the evidence of the 2nd appellant.

ii. Whether the trial magistrate rightly found that the respondent had proved her case on a balance of probabilities and that the counter-claim was not supported by any cogent evidence.

iii. Whether the decision of the learned trial magistrate was against the weight of the evidence.

iv. Who is entitled to the costs of this appeal.

48. Whereas in ground 6 of the appeal, the appellants complain that the trial magistrate failed to consider the testimony of the 2nd appellant, the court has noted that the appellants in their submissions did not make any arguments in support of that ground. Nonetheless, this court has perused the impugned judgment and noted that at page 4 thereof, the trial court clearly analyzed the evidence of the 2nd appellant as follows:

"...Upon close of the plaintiff's case, the defendants requested for time to prepare for their case. The defence case was finally commenced on June 10, 2021. The 1st and 2nd defendants

testified herein as DW1 & DW2 respectively. They also relied on the statements they had recorded as their evidence in chief and also called one witness in defence... The defendants in their evidence reiterated the contents of their defence and counter-claim. They stated that the suit land was part of their land ...and further admitted the settlement of their dispute by the Land Adjudication Committee. They went (sic) claim that the suit land did not belong to the Plaintiff as alleged and she wanted to grab their ancestral land the reason they put in a counter-claim. They stated that the suit land was actually created out of land parcel No 1455 Kanjoro Adjudication Section. Section that defence was reiterated by DW3.

...I have carefully analyzed, considered and weighed all the pleadings on record, all the evidence on record, all the documents relied upon by the parties herein in support of their case, the written submissions and the witness statements filed herein with the pleadings by both parties' vis-à-vis the applicable laws. The parties' duty in the instant case is quite specific as each party has a claim against the other..."

49. From the above and the record, it is quite clear that the learned magistrate considered the evidence of all the parties in arriving at his decision. There is therefore no basis for the complaint that the trial court failed to consider the evidence of the 2nd appellant.

50. Regarding the second and third issues, it is clear from the pleadings and the record that the parties cases against the other, were orders of permanent injunction. Whereas the Respondent's claim against the appellants was for an order of permanent injunction over land parcel No 3152/Kanjoro Adjudication Section, the Appellants on their part sought an order of injunction against the Respondent over land parcel No 1455/Kanjoro Adjudication Section.

51. From the record, it is apparent that in support of her claim over land parcel No. 3152/Kanjoro Adjudication Section, the Respondent tendered as an exhibit (P Exhibit 1) a copy of the adjudication record book showing that on July 6, 2017, she was recorded by the demarcation officer as the owner of the land. The material on record also confirmed that the said land borders land No 1455/Kanjoro Adjudication Section which belongs to the 1st appellant. It is also clear from the material on record and in particular P Exhibits 2 and 8 that the parties have had series of disputes over the suit parcels of land which were determined by the area chief and the land committee. It is also evident from the adjudication report dated October 21, 2020 that the Adjudication Officer confirmed that the appellants had interfered with the boundary fixtures of the two parcels of land. This court finds that a decision had been rendered and no objection or appeal was preferred as provided under section 26 and 29 of the *Land Adjudication Act*.

52. Section 26 of the *Land Adjudication Act* provides that:

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

53. Also section 29 which provides that:

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final

54. The above provisions are clear that a party can challenge an adjudication register by filing an objection to the adjudication officer in writing and the Adjudication Officer then determines the objection. Where a party is aggrieved by the decision of the adjudication officer, he/she is required to file an appeal to the minister and the decision of the minister in the appeal is final. This court notes that the trial magistrate correctly found that the parties had been heard and the boundaries of the suit parcels had been ascertained, aligned and demarcated in those previous proceedings in accordance with part III of the *Land Adjudication Act*.

55. It is clear from the material on record and especially the reports produced that the respondent owned parcel No 3152 while the appellants owned parcel No 1455.

56. On the issue whether the respondent had proved her case to the required standard, this court finds that the trial court rightly considered the principles laid out to prove the claim of trespass. In my considered view, the respondent adduced sufficient evidence before the trial court in support of her case for trespass against the appellants, and the trial court was right in finding that the respondent had proved her case on a balance of probabilities.

57. The appellants have submitted that the respondent in collusion with the adjudication officers alienated the 1st appellant's land No 1455 and awarded the respondent parcel No 3152/Kanjoro Adjudication Section. It is however clear from the record, that the appellants did not establish a case of fraud against the respondent. The appellants did not plead fraud in their defence and counter-claim and neither did they adduce any evidence that established a case of fraud. It is settled law that fraud is a serious accusation which procedurally has to be specifically pleaded and strictly proved. See order 2 rule 10(1) (a) of the *Civil Procedure Rules* and the case of *Ndolo –v- Ndoko [2008]* eKLR, among others.

58. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holding of the learned magistrate were well founded and I find no basis to interfere with it.

59. In the result, I find no merit in the appellants appeal and the same is dismissed with costs to the respondent.

60. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF JULY 2022 IN THE PRESENCE OF:

C/A: Martha

2nd Appellant present in person

N/A for 1st Appellant – Deceased

Muriithi h/b for Murango Mwenda for Respondent

C. K. YANO

JUDGE.