



**M’Kajuu v Mwika (Environment and Land Appeal E 117 of 2021)
[2022] KEELC 12607 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E 117 OF 2021**

CK YANO, J

SEPTEMBER 28, 2022

BETWEEN

JOSEPH NGORE M’KAJUJ APPELLANT

AND

SILAS GITONGA MWIKA RESPONDENT

JUDGMENT

Introduction

1. The proceedings leading to this appeal were commenced by Silas Gitonga Mwika, who is now the respondent, through a plaint dated 7th December, 2020 filed in the Chief Magistrate’s court at Maua. The suit was against Joseph Ngore N’Kajuu, who is now the appellant. The reliefs sought by the respondent against the appellant included inter alia: Ejection from land Parcel No. Igembe Central/Akirangondu’A’ 7571(hereinafter) “the suit property” and permanent injunction restraining the appellant from entering, interfering with the respondent’s entry, occupation and possession or otherwise dealing, entering, remaining, trespassing or in any other manner interfering with the suit property.
2. According to his plaint the respondent averred that he is the registered owner of the suit property having been sold the same by the appellant vide an agreement executed on 7th April, 2009. The respondent averred that after the execution of the said agreement, he paid the entire purchase and the appellant signed the necessary transfer documents. His claim was that the appellant trespassed onto the said land and commenced developments thereby denying the respondent vacant possession.
3. In his statement of defence filed in court on 13th January, 2021 the appellant denied having entered into any sale agreement. He further pleaded that the suit was time barred.
4. In his judgment, the trial Magistrate (A.G Munene SRM) who heard the respondent’s suit found in favour of the respondent and issued the reliefs sought.



5. Being dissatisfied with the judgment, the appellant lodged an appeal before this court. In his memorandum of appeal dated 21st October, 2021 the appellant has raised seven (7) grounds. In summary the appellant is aggrieved that the learned trial magistrate erred in law and fact in entering judgment against him in disregard of the defence, by relying on contradictory evidence, by failing to consider the appellant's pleading, by failing to find that the appellant did not sign the agreement and transfer produced by the respondent, in awarding costs of the suit to the respondent, and in giving judgment in favour of the respondent when the respondent had not proved his case without reasonable doubt.

Submissions

6. Pursuant to directions given by the court, parties filed written submissions upon which this court has to determine the appeal.
7. In his submissions dated 21st June 2022, the appellant who was in person consolidated the grounds of appeal. The highlight of the submissions are that the learned trial magistrate erred in law and fact in entering judgment in favour of the respondent against the weight of evidence. The appellant submitted that the respondent did not adduce sufficient evidence to prove that there was an agreement signed, that the consideration was paid and transfer documents signed. The appellant asserted that the respondent should have called the advocate who wrote the agreement and witnessed the payment of the purchase price.
8. Relying on the case of *Kiboro Wagoro Makumi –v- Francis Nduati Macharia & another* (2013)eKLR, *Peter Ngugi Kirigia – V Fredrick Nganga Kigira* (2021) eKLR, *Alice Wanjiru Rihiu V Messaiac Assembly of Yaweb* (2021) eKLR Which cited the case of *Mbuthia Macharia –V- Annab Mutua & another* (2017 eKLR and while citing the provisions of section 107 of the *Evidence Act* the appellant submitted that the burden of proof lied with the respondent and faulted the learned magistrate for shifting the burden of proof to the appellant. The appellant asserted that during the hearing the respondent produced a title deed in respect of the suit property which he claimed was excised from the appellant's original parcel no. 748 Akirangondu "A" adjudication section but did not produce any document to ascertain that indeed the said parcel of land was from the appellant's aforesaid original parcel of land. That the respondent did not also produce any sketch map or green card to show the nexus between the two parcels. The appellant submitted that the title deed held by the respondent and which he produced as an exhibit could just be a paper which the respondent wanted to validate by acquiring the land on the ground, noting that the respondent had never stepped on the suit land. The appellant added that his original parcel of land has never been subdivided and remains as a block.
9. Further, the appellant asserted that having denied the existence of the entire transaction, the respondent ought to have called the advocate who wrote and witnessed the agreement as well as the witness who was present and witnessed the transaction. The appellant submitted that he may not have filed proper pleadings before the lower court seeking cancellation of the respondent's title deed on grounds that it was fraudulently acquired, but that did not validate the sale transaction and/or discharge the respondent from his inescapable burden of proof. It is the appellant's submissions that the overriding principles of the *civil Procedure Act* and the rules made thereunder is to facilitate the just expeditious, proportionate and affordable resolution of Civil disputes governed by the Act and further that Article 159 (2) (d) of the *constitution* of Kenya 2010 stipulates that in exercising authority, the courts and tribunals shall be guided by the principle that justice shall be determined without undue regard of procedural technicalities. The appellant urged the court to allow the appeal and set aside the judgment of the lower court with costs.



10. The respondent who was also in person filed his submissions on 25th May 2022 in which the court was urged to dismiss the appeal with costs. It was contended that during the hearing, the appellant's evidence was that the respondent wanted to fraudulently acquire the suit land and alleged that there were summons issued by the lands office in the year 2017 and elders in the year 2000, but did not produce a copy of any of those. The respondent reiterated that he entered into a binding agreement for sale of land before an advocate and paid the purchase price in full where the appellant acknowledged payment. That the appellant also signed the transfer which was handed over to the land adjudication officers and the transfer was effected. The respondent asserted that he has a title deed as a prove of ownership.
11. The respondent submitted that the trial court heard the case on merit where each party was given time to present his case, and judgment was delivered in favour of the respondent. The respondent further submitted that when making the judgment, the trial magistrate considered the evidence given by both parties including the pleadings and the agreement produced that was signed. The respondent argued that the appellant's case was only a denial.

Analysis And Determination

12. This being a first appeal, this court is under an obligation to reconsider and evaluate the evidence and come to my own conclusion, bearing in mind that the trial magistrate had the advantage of seeing and assessing the demeanor of the witnesses, (*Selle & Another – V- Associated motors boats company limited* (1968 EA 123 and *Williamson Diamonds Limited V- Brown* (1970) EA1). I am also alive to the fact that as an appellate court, I ought to pay homage to the findings of the trial court unless such findings are based on no evidence or misapprehension of the evidence or the trial magistrate is shown to have acted on wrong principles in reaching the findings (*Jabane Vs- Olenja* (1986) KLR 664).
13. With the above in mind, I have reconsidered and evaluated the evidence which was adduced before the trial magistrate. I have also considered the pleadings filed by the parties.
14. Looking at the grounds of appeal in general, the same faults the learned magistrate on the ground that he failed to relate to evidence adduced by the parties and therefore arrived at the wrong conclusions. I have considered the pleadings and the evidence that was adduced in the subordinate court.
15. The issue is whether the appellant had sold the suit land to the respondent as pleaded and held by the trial court, or whether the respondent acquired the title to the land fraudulently as submitted by the appellant. The other issue is whether the suit is time barred.
16. Section 26 (1) of the *Land Registration Act* No. 3 of 2012 provides as follows;

“ 26

- (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-⁶

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party, or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

17. In this case, the respondent testified that he purchased the suit property from the appellant and paid the purchase price in full and that thereafter the appellant signed the necessary transfer documents, but has refused to give vacant possession. The respondent not only produced an agreement for sale but also a title deed in his name.
18. In his defence, the appellant gave a general denial that he never executed the said agreement. However, in his evidence, the appellant testified that the respondent wanted him to sell the land to him as he owed him Kshs. 4,500/=. The appellant further stated that they went to the lands office and before the elders but they could not agree. Although the appellant did not indicate what kind of dispute took them to the lands office and before the elders, it is unlikely that the appellant would have gone to such great lengths with someone with whom they had no transaction over the land. Further the standard of proof in civil matters is on standard of probabilities and not beyond reasonable doubt as submitted by the appellant.
19. In his evidence, the appellant stated that the respondent wanted to fraudulently acquire the suit land. It is trite law that any allegations of fraud must be pleaded and strictly proved. To succeed in claiming fraud, the appellant not only needed to plead but also to particularize it by laying out watertight evidence upon which a court would make such findings in his favour.
20. In the case of *Kuria Kiarie & 2 others Vs Sammy Magera* (2018) eKLR, the court of appeal held “the next and only issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nausingh 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 pleadings. The act 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. 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, this court in the case of *Kinyanjui Kamau – Vs- George Kamau* (2015) eKLR expressed itself as follows:-
- “ ... It is trite law that any allegation of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* (2008) 1KLR (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 standards 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.”
21. In this case, the appellant alleged fraud on the part of the respondent. However, the appellant did not plead the allegations of fraud and of course did not lead any evidence in support. It is very clear from the above decisions of the court of Appeal that it is not enough to simply infer fraud from the facts. Having considered the evidence presented in the subordinate court and the conclusion of the learned magistrate I am of the view that there can be no merit in this appeal and must fail.



22. I have also looked at the defence and the appellant has pleaded that the respondent's suit was time barred. It is the respondent's case that the agreement for sale of the suit land was executed on 7th April 2009. The suit before the Subordinate court was filed on 17th December, 2020. The period from 7th April 2009 till 17th December, 2020 is about eleven 11 years and eight (8) months. Section 7 of the Limitation of actions Act provides that "an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that persons. I find that under the circumstances of this case, the claim was not time barred. I say so because twelve years had not elapsed since the cause of action arose on 7th April 2009.

23. The last issue I need to address is in respect of costs. The appellant asserted that the trial magistrate erred in law and fact in awarding costs of the suit to the respondent. The general rule as to costs is provided for in section 27 of the Civil procedure Act which provides as follows:

27

- (1) subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid, and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers, provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

24. The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. In *Republic Vs Rosemary Wairimu Munene Ex-parte applicant Vs Ibururu Dairy Farmers co-operative Society* J.R No. 4/2014 as cited in the case of Cecilia Karuru Ngayu –Vs- Barclays Bank of Kenya & another (2016) eKLR it was held as follows-;

"... it is well recognized that the principle costs follows the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case..."

25. It is not in dispute that the respondent filed the suit which was denied by the appellant. The matter proceeded to hearing and the trial court rendered judgment in favour of the respondent plus costs. It has not been shown that the learned magistrate did not exercise his discretion judicially. The trial magistrate was within his power and discretion to award costs as he did. I find no compelling reason to interfere with that discretion.

26. The upshot of the above is that having reconsidered and appraised the evidence and the law, I come to the conclusion that the learned magistrate properly addressed and applied the law and was right in upholding the respondent's suit and granting the reliefs claimed. The order of costs in favour of the respondent was also in order as costs follow the event.

27. Accordingly, I find no merit in this appeal and do dismiss the appeal with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF SEPTEMBER, 2022

In the presence of

C/A Mwenda



Appellant – present in person

Respondent – present in person

C.K YANO

ELC JUDGE

