



**Kiriu v Kiriu & another (Environment & Land Case 13 of 2019)
[2022] KEELC 14878 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14878 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 13 OF 2019**

JG KEMEI, J

NOVEMBER 17, 2022

BETWEEN

BENARD KABEU KIRIU APPELLANT

AND

FRANCIS WAITHAKA KIRIU 1ST RESPONDENT

FELISTAS NYAKIO KUUMA 2ND RESPONDENT

*(Being an appeal against the whole judgement and decree of Hon L W Wachira
(Mrs) SPM dated the 24/9/2018 in CMCC No 241 of 2014 – Gatundu Court)*

JUDGMENT

1. This appeal arises from the judgment of the Hon LM Wachira, SPM, delivered on September 24, 2018 at Gatundu in CMCC No 241 of 2014.
2. In the trial court the appellant was the plaintiff and the defendant was the 1st respondent. The current interested party was an interested party in the trial court as well. The plaintiff sued the respondent and the interested party seeking the following orders:-
 - a. A reversal of the survey that resulted in new numbers being Kiganjo/Nembu/2822, 2823 and 2824 and a resurveying of the original grounds land parcel Kiganjo/Nembu/991.
3. It was the plaintiff's case that the subdivision and the mutation form in respect of the resultant titles was procured unlawfully, fraudulently and against his entitlement. It was his averment that his signature on the mutation form was forged. That as a result of the defendant's action his developments on the land including his house and that of his son were affected/interfered with. The defendants denied the plaintiff's claim and filed a defence and counterclaim on December 11, 2014. The defendant averred that he is the registered proprietor of Parcel No Kiganjo/Nembu/2823 and that the plaintiff has encroached on to his property without his consent and knowledge and sought the following orders: -



- a. The plaintiff's suit be dismissed with costs.
 - b. The plaintiff be ordered to give vacant possession of the suit land and eviction be ordered accordingly.
 - c. Mesne profits.
 - d. Costs.
4. The trial court determined the suit and dismissed the same on the September 24, 2018 on the grounds that the plaintiff failed to prove his claim. In addition, the court granted or allowed the counterclaim of the defendant and interested party.
5. Aggrieved by the decision and judgment of the trial court the appellant filed this appeal on the October 24, 2018 on the following grounds:-
- a. The learned magistrate erred in law and in fact in holding that the appellant had not proved that he was not involved in consultation, subdivision and signing of mutation and partition forms relating to the suit land.
 - b. The learned magistrate erred in law and in fact in failing to consider that the mutation form and partition forms were not signed by the appellant.
 - c. The judgment was contrary to earlier ruling dated June 25, 2015 by Honourable (Senior Resident Magistrate DM Ndungi) that the signatures purported to belong to the appellant were different.
 - d. The honourable court erred in law and in fact in considering extraneous matters not relevant to the issue in dispute.
 - e. The honourable court erred in law and in fact in holding that the subdivision was done as per the court order and the partitions and mutations signed by the parties.
 - f. The honourable magistrate erred in law and in fact in stating that the appellant had admitted to signing partition forms which was contrary to the evidence on record.
 - g. The learned magistrate erred in law and in fact in putting weight to the fact that no handwriting expert was called to testify while the appellant was categorical he had not signed any of the disputed forms.
 - h. The learned magistrate erred in law and in fact in holding issues should have been raised in the succession cause while no dispute was apparent on shares of beneficiaries of the suit land to be litigated at the succession cause.
 - i. The learned magistrate erred in law and in fact in holding that eviction should be effected.
 - j. The judgment was not based on evidence on record and the dismissal of the appellant suit was against the weight of evidence.
 - k. The learned magistrate erred in law and in fact in not holding that the appellant had proved his case on balance of probability.
6. The plaintiff seeks the following prayers:-
- a. That the judgment of the honourable magistrate dated September 24, 2018 in CMCC No 241 of 2014 be set aside and this appeal be allowed.



- b. That the honourable court be pleased to order the partition and mutation forms subject matter of this suit be declared as forgery and thereafter partition, mutation, subdivision and resurveying of LR No. Kiganjo/Nembu/991 be done afresh and any subdivision thereafter be declared null and void and entries relating to subdivision of LR No Kiganjo/Embu/2822, 2823 & 2824 be cancelled.
 - c. Further this honourable court be pleased to allow the appellant to tender further documentary oral evidence and especially of handwriting experts relating to the disputed signatures on partition and mutation forms.
 - d. In the alternative and without prejudice to prayers (a) the matter be referred back to another magistrate for de novo hearing of the suit.
 - e. That the cost of this appeal be borne by the respondent.
7. On the September 22, 2022 directions were taken before the court when the parties elected to prosecute the appeal by way of written submissions. The court directed the parties to file and exchange their submissions within 30 days, the deadline for filing of the submissions being the October 24, 2022. In addition, the court also gave directions on delivery of judgment. The appellant filed written submissions through the firm of Kaingati Kamunjo Advocates on October 24, 2022.
 8. By the time of writing this judgment there is no evidence that the respondent and the interested party complied with the directions of the court with respect to the filing of written submissions.
 9. Counsel for the appellant submitted and gave a historical background of the suit in the trial court. That the subdivisions emanated from the mother title being Kiiganjo/Nembu/991 which was part of the estate of the father of the appellant and the respondent. Counsel submitted that the gist of the appellants case is that the respondent and the interested party failed to involve the appellant in the process of surveying land and that his signature was forged on the mutation forms. *Inter alia* that the survey was done without the appellant's participation leading to his house and that of his son falling on the respondent's parcel of land.
 10. As to the whether the appellant is entitled to the orders sought, Counsel relied on the case of *Republic -vs- Senior Registrar of Titles Exparte Brookside Court Limited* (2012) eKLR where the court held that the sanctity of a title is protected under section 24, 25, and 26 of the *Land Registration Act* and that a title can only be impeached on ground of fraud or misrepresentation as is the case in this suit. Counsel submitted that the issue of fraud was alluded to by the Hon Magistrate in the ruling delivered on February 17, 2015 when the court noted that the signatures on the documents before the court including the mutation forms were different hence raising a reasonable doubt as to the authenticity of the signatures on the mutation form.
 11. Counsel further submitted that in this case the appellant being one of the beneficiaries of the estate was excluded during the process of the subdivision of the land. It was his submission that the subdivision was wrought with fraud leading to injustice on the part of the appellant that the forged mutation form formed the basis of the allocation of the registration numbers. That the subsequent issuance of titles were anchored on an unlawful process and therefore the titles are capable of being impeached or challenged. Further it was the appellant's submission that the respondent stated in evidence that he never saw the appellant sign mutation forms. The interested party on the other hand, he submits, was categorical that she never involved the parties in the subdivision.
 12. It was further submitted that the subdivision of the property was carried out without the appellant's consent and the same is therefore illegal and should be cancelled and the boundaries be affixed afresh



bearing in mind the developments and the interests of the parties. As to whether the appellant should be evicted from the suit property, the appellant argues that given the subdivision was done without the appellant's knowledge and that it took out portions of his developments the said subdivision is illegal, unjust, unfair and cannot be a basis of evicting the appellant from the land.

13. The appellant has urged the court to set aside the eviction order and order a new partition, mutation, subdivision and resurvey of the mother title and involve all the parties. See the case of *Margaret Wambui Kamau and 2 others -vs- Eutycus Mwangi Karanja* (2022)eKLR.
14. On who should bear the burden of costs the appellant relying on section 27(1) of the *Civil Procedure Act* submitted that courts have the unfettered discretion to determine by whom and of what property and what extent costs are paid in a suit. In this case the appellant has urged the court to condemn the respondent and the interested party to pay the costs.
15. Having read and considered the record of the trial court, the record of appeal, the submissions filed by the appellant and all the materials placed before me the issues that commend themselves for determination by this court are as follows:-
 - a. Whether the appellant proved fraud and or forgery of his signature on the mutation form.
 - b. Whether the learned hon magistrate erred in law and in fact in arriving at the decision and the judgment delivered on the September 24, 2018.
16. The duty of this court is set out in section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court to include the re-evaluation, reassessment and re-analyzation of the record and draw its own conclusions. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions from the analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. Besides, that duty has been affirmed in numerous decisions of the superior courts. In the case of *Selle & another vs Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

“ ... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
17. Bearing in mind the above principles I shall then proceed to determine the appeal before me.
18. It is also commonly accepted that the parties to this appeal are related. It is not in dispute that the mother title Kiganjo/Nembu/991 was registered in the name of Kamau Kiri to hold in trust for his family. Kamau Kiri was the brother and father of the appellant and the 1st respondent and the sister of the interested party. The appellant is a younger brother of the respondent and the interested party is a common aunt to both parties.
19. Upon the death of Kamau Kiri who was an uncle of the appellant and the respondent the land devolved through the certificate of confirmation of grant dated April 4, 2013 to the three parties in the proportion of; 0.995 acres, 0.995 acres and 1.91 acres respectively. It is not in dispute that the parties agreed to partition the land among themselves in accordance with the certificate of confirmation of grant aforesaid.



20. It is borne from the record that the parties executed an application for partition (undated) of the mother title. The borne of contention of the appellant is that although he signed the partition document he did not sign the mutation form dated the October 9, 2013. I have examined the said document and it is evident that the mutation is signed by all the parties. I have carefully looked at the partition documents and the three signatures that appear on the mutation form also appear on the partition document. So much so that to a naked eye the signatures would appear similar.
21. The gist of the appellant's case in the lower court was premised on fraud/forgery. It was the appellants case that his signature on the mutation form is a forgery. The appellant's case as earlier stated is anchored on fraud.
22. It is trite that he who alleges must prove. Section 109 of the *Evidence Act* provides that:
- “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.”
23. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
24. It is trite that fraud must be pleaded and proved in evidence. It cannot be inferred from the facts on record. This was buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, where the court stated 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.”
25. The standard of proof in cases of fraud is as set out in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR where the court stated 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
26. Fraud being a serious allegation, the appellant was duty bound to prove his claim of forgery. I have carefully perused the ruling in the trial court where the magistrate alluded to the absence of evidence of an expert to prove forgery. It is clear that the appellant failed to avail a handwriting expert to prove that the signatures as they appear on the mutation form truly do not belong to him. In the absence of such proof the court has no cogent evidence to make a finding in support of the forgery.
27. In that regard therefore the court has no ground to fault the honourable learned magistrate in making a finding that the appellant did not prove the allegations of fraud and forgery.



28. With respect to the issue as to whether the subdivision was carried out in the presence of the appellant the court would like to replicate the evidence of the appellant as follows:-

“...We went to the ground and the land was subdivided, so that each of us takes his/her portion – in the year 2014. The surveyor came and divided on the ground. The process of subdivision did not involve me. We went to the board for the consent, but then after that I was not consulted during the mutation and actual division of the land. (Shown mutation form filed by defendant). When I saw people on the ground, I checked from the Ministry of Lands and was shown a mutation that I had not signed. (Shown page 2 of mutation). It has 2 signatures and a finger print. None of the two signatures is mine. Pg 4 – It also does not also have my signature. I was not on the ground during the filling of the mutations. I was only told about the surveyor having come, long after the surveying had been done. I was told by the Chief B M Okumu, the surveyor, is not known to me. I did not instruct any surveyor. My problem is that I was not involved in the process. When I saw

29. The statement “when I saw people on the ground” read together with the opening statement that “we went to the ground and the land was subdivided alludes to the plaintiffs having had knowledge of the subdivision.

30. It was the evidence of the interested party that the subdivision was carried out in accordance with the manner in which the parties occupied the suit land (before the appellant moved into his mother’s house and into the respondents portion). That the mutation forms captures the occupation arrangement on the ground. The interested party on the other hand testified and stated as follows:-

“Even at the board, they did not object to the division. It is me who got a Surveyor. He is from Kibichoi. I went with Waithaka. Benard was not present. He was informed by the Assistant Chief of the date of the visit to the ground for subdivision. We had mutation and subdivision done which is the procedure after the consent. The plaintiff knows the Surveyor. He objected whole, we were on the ground and that is when I got a court order for police supervision. I signed all documents at the DO’s place. I do not know why he is objecting.”

31. Going by the evidence adduced by the parties above it would appear that the appellant was not present when the Surveyors came to the ground to affix the beacons but had knowledge of the exercise having executed the partition document. The appellant has insisted that he was not present during the visit by the Surveyor. That may be so. I have perused the impugned mutation form which in itself captures the sizes, the distances between one plot to another and the shapes of the plots and in my considered view the appellant has not stated that the Surveyor affixed the beacons contrary to the mutation form so much so that whether he was present or not would not change the content of the mutation forms. In my view therefore this appeal does not turn on this issue either way.

32. On the third issue, and having evaluated the entire record of appeal I find that the learned honourable magistrate did not err in arriving at the decision that she did. I find nothing to fault the trial court.

33. In the end the appeal is without merit it is dismissed with costs to the respondent and interested party.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Ms Kadenge for Appellant

Wangari HB Wambui for 1st and 2nd Defendant

Court Assistant – Kevin

