



REPUBLIC OF KENYA



KENYA LAW
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**Majani v Omwami (Environment and Land Appeal E005 of 2022)
[2022] KEELC 14915 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

E ASATI, J

NOVEMBER 17, 2022

BETWEEN

DAWSON MAJANI APPELLANT

AND

RAYMOND K. OMWAMI RESPONDENT

***((Being an appeal against the judgement/decree of Hon. ROSE NDOMBI
(SRM) delivered on 09/06/2022 in VIHIGA M.CL&E CASE NO.11
OF 2022 RAYMOND K. OMWAMI VERSUS DAWSON MAJAN))***

JUDGMENT

Introduction

1. The Appellant herein was the Defendant in Vihiga SPMCC (ELC) No 11 of 2022 wherein the plaintiff (Respondent herein) had sued him for: -
 - a. An order for exhumation of the body of one Nedi Mijide Majani from land known as North Maragoli/Bukulunya/293 (the suit land herein)
 - b. The OCS Kilingili police station provide security when the saidis being done.
 - c. The Defendant by himself or his agents, relatives, servants, assignees or employees be evicted from the suit parcel land No N Maragoli/Bukulunya/293.
 - d. Costs of the suit.
2. The Appellant filed a statement of defence and Counter-claimfor half of the suit land on account of purchase and possession since the year 1980.
3. The suit was heard before the SPM's court at Vihiga and Judgment delivered on June 9, 2022. The court entered judgment in favour of the Plaintiff for orders that: -



- a. The body of Nedi Mijide Majani be exhumed from the land parcel No North Maragoli/Bukulunya/293 forthwith
 - b. The OCS Kilingili police station to provide security during the exhumation and the eviction process thereafter.
 - c. The MOH Vihiga County Referral Hospital to oversee the exhumation and the remains be preserved at the mortuary pending interment to an alternative site by the family members.
 - d. The Defendant by himself, or his agents, relatives, family, servants, assignees or employees all to be evicted within 90 days from the date of this Judgment.
 - e. Costs of the suit is awarded to the plaintiff herein.
4. Dissatisfied with the Judgment the Appellant preferred the Appeal herein vide the memorandum of Appeal dated June 13, 2022.
 5. The grounds of Appeal as contained in the memorandum of appeal are as follows: -
 - i. That the learned Trial Magistrate erred in law in failing to appreciate the issue of fraud alleged and the unlawful manner in which the Respondent acquired registration to the whole of the suit property knowing well that the Appellant was entitled to half of the same.
 - ii. That the learned Trial Magistrate erred in law and fact when she failed to recognize that the Respondent held the suit property herein as trustee for the Appellant and his other siblings and therefore there was an implied trust.
 - iii. That the learned Trial Magistrate erred in law and fact when she failed to realize that the lower court record had been tampered and new evidence in favour of the plaintiff illegally sneaked into the court record and added into the court file after the parties had testified.
 - iv. That the learned Trial Magistrate erred in law and fact when she took into consideration irrelevant facts and matters not related and or relevant to the case before her and failed to take into consideration relevant matters thereby arriving at a wrong conclusion.
 - v. That the Learned Trial magistrate erred in law and fact when she believed the evidence plaintiff's evidence verbatim as presented and totally rubbished the Respondent defence.
 - vi. That the Learned Trial magistrate analysis of the pleadings and evidence was biased as against the Appellant.
 - vii. That the learned Trial Magistrate understanding of the Land Law and specifically how land is transferred at the Land Control Board was limited and specifically on registration of land.

Submissions

6. Directions were taken by consent that the appeal be canvassed by way of written submissions. The Appellant filed written submissions dated October 3, 2022 through the firm of Elung'ata & Co Advocates. He submitted that it was the failure by the Respondent to honour the land sale agreement between the Appellant and the Respondent's father that led to the dispute in court. That the green card produced as exhibit shows that the suit land was registered in the name of the Respondent on 17.7.1991. that the judgement in the lower court was delivered in the absence of the appellant and his advocate.



The appellant further submitted that the judgement was first scheduled for 2.6.2022 but on the said date, parties were informed that judgement would be on notice. That the Defendant and his counsel were thereafter never notified of the new judgement date.

The decree was drawn on the same day the judgement was delivered and executed the following day on June 10, 2022 by exhumation and removal of the remains of NediMijideMajani, deceased, from the suit land and taking them to Mbale County Referral hospital for preservation.

That the lower court did not award the appellant the right of appeal as should be the case or judicial practice. Counsel submitted that the court was biased towards the Plaintiff and that the court, the clerks and the plaintiff ganged up to compromise the proceedings. That the Plaintiff's witness statement which was not initially filed was later after close of both the Plaintiff and Defence case introduced into the proceedings.

Counsel submitted further that the learned trial Magistrate failed to note that the Respondent misled the members of Vihiga Land Control Board and hence obtained registration of the suit land by fraud and deceit. That the trial Magistrate did not give good legal reasons why she dismissed the counterclaim. That the appeal is merited and prays that the same be allowed.

7. The Respondent filed written submissions dated 4.10. 2022 through the firm of Mukabi & Co. Advocates. He submitted that the appellant cannot allege fraud on appeal when the same was not pleaded in the lower court. That Order 2 Rule 4 Civil Procedure Rules required the Appellant to plead fraud. He relied on the case of *Koinange and 13 others v Charles Kanga Koinange* 1986 KLR pg 23 and *Vijay Morjaria v Nansingh Mandbusingh Darbar & another* [2000] eKLR to submit that the standard of proof is higher in cases of fraud. That the Appellant did not specifically plead fraud or prove the same to the required degree. That the Respondent did not hold the suit land in trust for the Appellant. That the Appellant does not dispute that the suit land is registered in the name of the Respondent. That the legal burden to prove existence of trust rests with the Appellant. Relying on the cases of *Isaack Kieba M'inanga v Isaaya, Juletabi African Adventure Limited & another v Christopher Michael Lockey* [2017] eKLR and *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR Counsel submitted that such trust was not proved. He prayed that the appeal be dismissed.

Analysis and determination

8. This being a first appeal, this court is under a duty to reconsider the evidence adduced and re-evaluate, re-analyze it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence adduced and the applicable law. See case of *Peter M. Kariuki v Attorney General* [2014] eKLR and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR
9. The Respondent's evidence before the trial court was that he was at all material times the registered owner of land parcel known as North Maragoli/Bukulunya/298 (the suit land) having been issued with the title deed in respect thereof on July 17, 1991. That on the night of Saturday the Defendant buried the body of his deceased mother by the name of Nedi Mijide Majani on the suit land without the Plaintiff's knowledge or consent. The Plaintiff therefore sought for orders of exhumation of the body and the eviction of the Defendant, his agents and family from the suit land.
10. The Appellant denied the Respondent's claim. He contended that the remains of his late mother Neddy Kijide Majani were lawfully buried on the portion of the suit land legally purchased from the Plaintiff's father one Peter Mwami Nasiali sometime in the year 1980. That he has had occupation of the suit land for a period of 42 years to date.



11. The first ground of Appeal is that the Trial Magistrate erred in law in failing to appreciate the issue of fraud alleged and the unlawful manner in which the Respondent acquired registration to the whole of the suit property knowing well that the Appellant was entitled to half of the same.

The law requires that allegations of fraud must be specifically pleaded and strictly proved to the standard and degree of proof established by law. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi, JA (as he then was) 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

12. The Plaintiff/Respondent’s evidence was that his father who was the previous registered owner gave the land to him. That the certificate of official search produced by the Appellant shows that the land was first registered in the name of Peter Mwami (the Plaintiff/Respondent’s father) on 9.7. 1973 who transferred the same in favour of the Plaintiff/Respondent on 17. 7. 1991. Certificate of death in respect of Peter Mwami Nasiala also produced as exhibit by the Appellant shows that the deceased died on December 30, 1991. This shows that the transfer was done in the life-time of the deceased. No illegality or fraud was pointed out in the transactions leading to the transfer of the suit land in favour of the Respondent.

13. It was the appellant’s duty to prove fraud. The standard of proof required for claims based on fraud is higher than in the ordinary civil cases. In *Koinange & 13 others v Charles Karuga Koinange* [1986] KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

I do find that the claim based on fraud was not properly pleaded or pleaded at all and that the same was not proved and hence there was no material placed before the trial court to consider and appreciate the same. This ground of appeal has not been proved.

14. The second ground of appeal is that the trial court erred in law and fact by failing to recognize that the Respondent held the suit property herein as a trustee for the Appellant and his other siblings and therefore there was an implied trust.

There was no pleading in the Defence and counterclaim concerning trust. Perusal of the Appellant’s witness statement which was adopted as his evidence in chief reveals that there was no claim therein that the land was registered in the name of Respondent in trust for the Appellant or the Respondent’s siblings.

15. The Plaintiff (Respondent herein) on the other hand pleaded that the land was registered in his name as absolute owner and in his evidence in court testified that his father gave the land to him before he (Respondent’s father) died. He stated that he inherited the land properly from his father and denied that it was registered in his name as a trustee for other people including the Appellant.



16. The burden of proof of the existence of the alleged trust vested with the Appellant. The Supreme Court in the case of *Isaac M'inanga Kiebia v Isaaya Theuri M'lintari & another* (2018) eKLR held:

“Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group.”

17. I have read the entire of the evidence placed before the trial court by the Appellant. I find no evidence was availed that the suit land was registered in the name of the Respondent in trust for the Appellant and Respondent's sibling.

18. The third ground of appeal is that the Trial Court failed to realize that the lower court record had been tampered with and new evidence in favour of the Plaintiff illegally sneaked into the court record and added into the court file after the parties had testified.

The Appellant submitted that the Respondent's witness statement dated March 7, 2022 and allegedly filed in court on March 11, 2022 is a totally strange and new document introduced to the proceedings after both the Plaintiff and the Defendant had testified. It was submitted that the new document was heavily prejudicial to the Defendant's case as the trial court's judgement was heavily hinged on the contents of the said new and strange document introduced in the court file after both parties had testified.

The Respondent submitted that the Appellant has not proved this ground. He submitted that no new evidence in favor of Plaintiff were illegally sneaked into the court record and added into the court file after the parties had testified. He submitted that all parties complied with order 3 rule 2 of the *Civil Procedure Rules* by filing and serving each party with relevant documents. He further submitted that all the documents produced by the Respondent were filed and served to Appellant before the hearing. That the trial court considered evidence and documents which admitted in evidence during the hearing. And that at no time did the Respondents file new evidence after the parties had testified.

19. The proceedings of the trial court are on pages 154 to 172 of the Record of Appeal filed by the Appellant. I have keenly read them and noted that the same are in the order in which the events occurred from the date the suit was filed to the date of the Judgment. It shows that the Respondent and his witnesses testified and closed his case on 19/4/2022. The Record of Appeal further shows that the Appellant (defence) presented his case on 21/4/2022. That after the close of the Appellant's case a date was set for Judgment. The next event was the delivery of the judgment on 9.6.2022. It shows further that the Respondent in his testimony in court on 19/ 4/ 2022 referred the court to his witness statement dated 7/3/2022 and requested that the same be adopted as his evidence. This was in the presence of the Appellant's Counsel. It can therefore not be true that the same statement was sneaked into the court file after parties had testified.

My finding is that the Appellant has failed to prove this ground of appeal.

20. The 4th ground of appeal is that the trial Magistrate erred in law and fact when she took into consideration irrelevant facts and matters not related and or relevant to the case before her and failed to take into consideration relevant matters thereby arriving at a wrong conclusion.



The Appellant has not pointed out the irrelevant matters taken into consideration and the relevant matters that were not taken into consideration. This ground of appeal has not been proved.

21. The 5th ground of appeal is that the Trial Magistrate erred in law and fact when she believed the evidence of the Plaintiff verbatim as presented and totally rubbished the Respondent's defence.

This ground is related and almost similar to ground 6 of the appeal which is that the Learned Trial Magistrate's analysis of the pleadings and evidence was biased as against the Appellant.

The proceedings show that the court considered the evidence produced by both parties and came to its conclusion. The Appellant has not shown particulars of the alleged bias. The impugned judgment contains summary of the evidence by each party the analysis thereof and decision thereon.

22. The last ground of Appeal is that the Learned Trial Magistrate's understanding of the Land Law specifically how land is transferred at the Land Control Board was limited and specifically on registered land.

Just like the other grounds already dealt with, the Appellant has not given particulars of any gaps in the Judgment that show lack of knowledge of land law by the trial court.

It was the duty of the parties to bring evidence before the court in support of their case. If there was any material in respect of the Land Control Board that the Appellant wished to rely on, he ought to have availed it to the trial court. The Appellant's documents as contained in the list and bundle of documents dated March 22, 2022 did not include any document or reference to Land Control Board. It is not disputed that the suit land was transferred by the Respondent's father to the Respondent *inter vivos*. There was no pleading or evidence on the part of the Appellant concerning Land Control Board.

23. The upshot is that the grounds of appeal are not proved. Consequently, the appeal fails and the same is hereby dismissed. For reasons that the parties are related let each party bear own costs.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT KISUMU IN OPEN COURT THIS 17TH DAY OF NOVEMBER, 2022.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant

No appearance for the Appellant.

No appearance for the Respondents.

E. ASATI,

JUDGE.

