



**Kibanga v Kungu (Environment and Land Appeal 7 of 2017)  
[2022] KEELC 15222 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 7 OF 2017  
CK YANO, J  
DECEMBER 7, 2022**

**BETWEEN**

**DAVID MUCHIRA KIBANGA ..... APPELLANT**

**AND**

**FRANCIS MWITI KUNGU ..... RESPONDENT**

*(Being an appeal from the judgment of the chief Magistrate court at Maua  
(HON. C. KEMEI) R.M in Maua CMCC 120 OF 2012 delivered on 5/11/2013)*

**JUDGMENT**

**A. Introduction**

1. The appellant David Muchira Kibanga filed this appeal against the judgment of the chief Magistrate Maua ( Hon C Kemei RM) in Maua CMCC 120 of 2012 delivered on November 5, 2013 and set out the following 8 grounds of appeal:
  1. That the learned trial magistrate erred in law and fact in finding that the burden of proving the respondent's claim on a balance of probability lay with the appellant and not the respondent.
  2. That the learned trial magistrate erred in law and fact in reaching a finding that does not flow from the analysis of evidence before her.
  3. That the learned trial magistrate erred in Law and fact in basing her decision on allegations of fraud and collusion between the appellant and the lands officers when the lands office had not been enjoined as a defendant in the suit.
  4. That the learned trial magistrate erred in law and fact in ignoring the evidence of the appellant.
  5. That the learned trial magistrate erred in law and fact in reaching a finding contrary and against the weight of evidence before her.



6. That the learned trial magistrate erred in law in misconstruing the import of Section 3 (3) of the *Law of Contract Act* Cap 23 Laws of Kenya and thereby ended up applying the said provisions against the appellants' defence instead of against the respondent's suit.
  7. That the learned trial magistrate erred in law in failing to either strike out or dismiss the respondent's claim in view of the provisions of Section 3 (3) of the *Law of Contract Act*.
  8. That the learned trial magistrate erred in law in failing to observe that the respondent's claim in the court below contravened the mandatory provisions of Cap 283 and 284 of the Laws of Kenya.
2. The appellant prayed that the appeal be allowed and the judgment by the learned trial magistrate be set aside.

### **Background Of The Appeal**

3. The gist of the case in a nutshell is that the respondent Francis Mwiti Kiunga filed a suit vide a plaint dated June 5, 2012 against the appellant seeking for various orders. In the plaint the respondent averred that on March 4, 2009 the appellant fraudulently working in collusion with the then demarcation officer Maua/Amwathi adjudication Section stealthy and secretly caused the respondent land Parcel No 9151 Maua/Amwathi to be transferred to his name effectively depriving the respondent the whole property.
4. The respondent particularized particulars of fraud as follows:
  - I. Causing the suit land to be transferred in the appellant name, illegally and secretly.
  - II. Colluding with Demarcation Officer to cheat the respondent to sign for withdrawal of caution and lease agreement when indeed they knew it was for transfer of land thereby depriving the appellant's whole property and land.
  - III. Presenting to the demarcation officer forged documents.
5. The respondent is the current registered owner of land parcel Number Maua/amwathi/9151 measuring 0.15 acres and thereabout.
6. The respondent avers that the transfer and change of ownership of land parcel Number 9151 Maua/Amwathi is illegal and wrongful and should not be allowed to stand.
7. The respondent claim against the appellant is for cancelling of transfer of land parcel number 9151 Maua/amwathi and declaration that parcel 9151 Maua/Amwathi belongs to the respondent excluding the appellant.
8. The respondent prayed for judgment against the appellant for:
  - a) Cancelling of transfer of land parcel No Maua/Amwathi/9151 and declaration that the same belongs to the respondent excluding the appellant
  - b) Any other better relief the Honourable court deems fit and just to grant.
9. The appellant in his defence dated June 22, 2012 denied the claim and put the respondent to strict proof thereof.
10. After hearing evidence from both the appellant and the respondent, the subordinate court allowed the respondent's suit in the following terms:



- a) Cancelling of transfer of Land Parcel No Maua/Amwathi/9151 and a declaration that the same belongs to the respondent excluding the appellant.
  - b) Costs of the suit.
11. In her judgment, the trial magistrate considered that from the evidence before her no written agreement for the sale of land in dispute was presented before the court and the proceedings before the Meru North District Amwathi Maua Adjudication Section proceeded in the absence of the respondent. The trial magistrate noted that orders were issued even after the objector had informed the panel that there was an outstanding balance of Kshs 6,000/= and despite the fact that the appellant had tendered evidence stating that he bought the land for Kshs 40,000/= he had not been able to prove that he paid the entire sum of Kshs 40,000/=. The learned magistrate however observed that the appellant has been able to prove that he gave the respondent Kshs 7,000/= and paid Kshs 2000/= to the respondent's wife and it was not clear if the said money was paid to him as part of the consideration for the land or not. The appellant also stated that the respondent and his friend took meals at his hotel in Kaciongo amounting to Kshs 6,000 and no evidence was presented to support the same. The trial court further observed that the appellant had not presented an agreement for sale of land between him and the respondent and he had failed to prove that indeed he paid Kshs 40,000/= to the respondent as consideration for the land.
12. The learned trial magistrate considered the provisions of Section 3(3) of the Law of Contract Act Cap 23 Law of Kenya which states 'No suit shall be brought upon a contract for the disposition of an interest in law unless':
1. The contract upon which the suit is founded –:
    - i. Is in writing
    - ii. Signed by all the parties thereto
    - iii. Incorporates all the terms which the parties have expressly agreed in one documents, and
  2. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
13. The learned Magistrate further noted that even if there was a valid agreement for sale of land, the appellant has not proved that he did his party of the agreement and that all the witnesses including the defence witnesses told the court that the respondent owned the land before it was transferred to the appellant.
14. The trial court further noted that the appellant had failed to prove that the suit land was legally sold and transferred to him by the respondent.
15. The appeal was canvassed by way of written submissions. The appellant filed his on September 22, 2022, while the respondent filed his on October 3, 2022.

### **The Appellant's Submissions**

16. On ground 8 of the Appeal the appellant submitted that the learned trial magistrate erred in law and fact in failing and ignoring the fact that the respondent's claim before her contravened the mandatory provisions of Section 26 and 29 of CAP 283 and 284 Laws of Kenya.



17. The appellant further submitted that the learned trial magistrate literally sat on appeal of a decision by the land adjudication officer in Amwathi Maua objection No 1973 aforesaid when by her judgment she cancelled the appellant's registration as proprietor of the suit land and which registration had been lawfully obtained pursuant to the Land Adjudication Officer's decision on objection no 1973. The appellant submitted that the learned trial magistrate did not have any jurisdiction to reverse a decision and or registration obtained pursuant to a decision in objection proceedings under Section 26 (1) and (2) of the [Land Adjudication Act](#), cap 284 of the Laws of Kenya and that jurisdiction is a pure preserve of the minister and that the respondent never filed any appeal against the decision in objection proceedings under Section 26(1) and (2) of the [Land Adjudication Act](#), Cap 284 of the Laws of Kenya and that jurisdiction is a pure preserve of the minister and that the respondent never filed any appeal against the decision of the Adjudication Officer in objection No 1973 aforesaid.
18. The appellant submitted that Section 29 (1) and (b) of the [Land Adjudication Act](#) Cap 284 provide that an appeal from the decision of the Land Adjudication Officer in an Objection under Section 26(1) and (2) of the Act, shall lie to the Minister and that the decision of the Minister On appeal shall be final.
19. The appellant further submitted that in line with the foregoing provisions and the respondent having not appealed against the Land Adjudication Officer's decision in objection No 1973 aforesaid the adjudication register of the suit land became final under Section 26A (1) of the Act and thereby resulting in the issuance of registration and title to the appellant under Section 26A (1) (b) of the Act.
20. The appellant contends that he is currently the sole lawful registered owner of the suit land now specifically referred to as Igembe/ Amwathi Maua/9151 as demarcated on Registry Sheet No 4/12 and measuring 0.05 Ha.
21. The Appellant submitted that Section 29 (1) (a) and (b) of the [Land Adjudication Act](#) Cap 284 provides in no uncertain terms that any appeal from the decision of the land Adjudication Officer is or shall lie to the minister and the decision of the minister on appeal is final. The appellant argued that the Act therefore donates no Jurisdiction at all to a Resident Magistrate Court to in any way whatsoever interfere with a decision of the Land Adjudication Officer under Section 26 (1) and (2) or that of the Minister on appeal under Section 29 1 (a) and (b) of the [Land Adjudication Act](#) Cap 284.
22. The appellant submitted that the learned trial magistrate's judgment literally overlooked the mandatory provisions of Section 26, 26A and 29 of the [Land Adjudication Act](#) Cap 284 as it sought to reverse/review and altogether set aside the decision of the Land Adjudication Officer in objection No 1973 a jurisdiction by law not bestowed on the learned trial magistrate but on the minister under Section 29 (1) (a) (b) of the [Land Adjudication Act](#) Cap 284. The appellant submitted that it is clear from the learned trial magistrate's judgment and in particular at page 35 of the record that the trial magistrate overstepped her mandate and in total contravention of the clear provisions of section 26(1) and (2) and 29 (1) (a) and (b) of the [Land Adjudication Act](#) Cap 284, delved into interrogating and questioning the decision of the Land Adjudication Officer.
23. The appellant submitted that the other option would in law be for the respondent to file a judicial review proceeding against the Land Adjudication Officer and the Hon the Attorney General seeking to quash the decision in AR Objection No 1973 which the respondent never did. The appellant further submitted that the learned trial Magistrate got it all wrong when she proceeded to address her mind on matters of contract before first ascertaining whether or not she had jurisdiction to review and or invalidate an AR objection decision by the Adjudication Officer.



24. The appellant contends that the learned trial magistrate unnecessarily labored in vain and that had she appraised herself with the clear provisions of sections 26, 26A and 29 of the [Land Adjudication Act](#) Cap 284, she would have downed her tools at the earliest opportunity by striking out the suit in limine.
25. The appellant further contends that in his plaint at paragraph 3, the respondent pleaded that the appellant had colluded with the demarcation Officer Maua/Amwathi Adjudication Section to cause the respondent's land no 9151 Maua/Amwathi transferred to the appellant's name, adding that despite that, the learned trial magistrate failed to make a finding that the land Adjudication Officer and the Honourable Attorney General were necessary parties to the suit and that the claim could not have succeeded without those parties on board.
26. The appellant submitted that in the circumstances of the case, it was absolutely unnecessary for the Honourable trial magistrate to invoke the provision of Section 3 (3) of the [Law of Contract Act](#) considering that prima facie, she did not have jurisdiction to invalidate the decision of the Land Adjudication Officer AR Objection No 1973 aforesaid.
27. The appellant further submitted even assuming that the [Law of Contract Act](#) was to come into play in the case, the trial magistrate failed to appreciate that some contracts may be implied from the story/evidence given by witnesses.
28. The appellant submitted that from the evidence of the appellant and his witness Mercy Nkatha Mwiti, it can be discerned and implied that indeed there was a contract of sale between the appellant and the respondent.
29. The appellant further submitted that the learned trial magistrate ought to have invoked the spirit and letter of Article 159 of the [Constitution](#) together with Section 1A and 1B of the [Civil Procedure Act](#) so as to serve substantive justice as opposed to allowing the respondent's ill-fated claim when she did not even have jurisdiction to do so.
30. The appellant further submitted that the learned trial magistrate did not properly analyze the evidence and exhibits relied on by the appellant and in particular the proceedings/decision in AR Objection No 1973 as to reach a fair and just decision of the matter.
31. The appellant submitted that the learned trial magistrate merely hinged her decision on the provisions of Section 3(3) of the Law of Contract instead of striking out the suit for lack of jurisdiction and non-compliance with the provisions of Section 26 and 29 of Cap 284 of the Laws of Kenya.
32. In conclusion, the appellant submitted that the suit land No 9151 Maua/Amwathi, subject of the respondent's suit before the trial court was the same subject matter of AR objection No 1973 before the Land Adjudication Officer Maua/Amwathi Adjudication Section vide which the suit land was lawfully transferred to the appellant in a decision made by the Adjudication Officer sometimes on March 4, 2009.
33. The appellant submitted that the learned trial magistrate's decision/judgment had the effect of reviewing the decision of the Land Adjudication Officer in Objection No 1973 aforesaid and that the learned trial magistrate did not have that jurisdiction.
34. The appellant submitted that the trial magistrate literally usurped the jurisdiction of the Minister as provided for under section 26, 26A and 29 of the [Land Adjudication Act](#) Cap 284 by unlawfully sitting on appeal of a decision by the Land adjudication Officer, a jurisdiction that she did not have in Law.
35. It is the appellant's submission that Jurisdiction is everything and that the learned trial magistrate elected to labour in vain. Consequently, the appellant urged the court to allow the appeal with costs.



## Respondent's Submission

36. In his submission, the respondent supported the trial court's judgment dated November 5, 2013 in the lower court.
37. The respondent submitted that the facts of the case can be gleaned from the record that the respondent was the original owner of land parcel No Maua/amwathi/9151 and the appellant fraudulently caused the said parcel of land to be transferred to him and was registered under his name. That the record shows that the respondent never signed any agreement for sale of land at any one time and neither did he execute any transfer forms.
38. The respondent contends that it was the appellant's evidence during the hearing that he filed objection proceedings at the Land Office and that the said objection was heard and determined in the absence of the respondent and it was then that the land was transferred to the appellant without the respondent's knowledge.
39. The respondent submitted that he denied the existence of such objection proceedings or having been summoned to the land office for the objection proceedings. The respondent further submitted that the appellant did not produce certified copies of the alleged proceedings and neither was the objection number disclosed during the hearing and the appellant cannot therefore introduce Amwathi Maua Adjudication Section Objection No 1973 on appeal when it did not feature in the lower court and that that amounts to introduction of new evidence which will not be subjected to cross examination in the normal manner of trial and that it is an abuse of the Appellate Jurisdiction of the Court.
40. The respondent submitted that submissions are not evidence and the Appellant cannot introduce fresh evidence which is a complete departure from their pleadings and evidence adduced at trial.
41. The respondent cited the case of [\*Elizabeth Chepkoech Salat v Josephine Chesang Chekwony Salat \[2014\] eKLR\*](#) wherein the court of appeal rejected the introduction of new evidence at the appeal stage when it was apparent that the applicant had access to the said evidence at the initial trial.
42. The respondent submitted that the trial magistrate rightly quoted Section 3 (3) of the [\*Law of Contract Act\*](#) Cap 23 of the Laws of Kenya.
43. The respondent further submitted that the learned trial magistrate found as a fact that there was no legally binding written agreement and further that the respondent was not present at the proceedings alleged before the land Adjudication Officer.
44. The respondent submitted that the submissions with respect to the [\*Land Consolidation Act\*](#) cap 283 Laws of Kenya and the [\*Land adjudication Act\*](#) Cap 284 Laws of Kenya are not applicable, adding that the appellant did not adduce any evidence to the effect that the adjudication process was still ongoing in the area when the matter was filed in court.
45. The respondent further submitted that the adjudication register for Amwathi Maua Adjudication Section had become final in all respects under Section 29 (3) of the [\*Land Adjudication Act\*](#) Cap 284 Laws of Kenya and that the respondent had been issued with ownership documents pursuant to Section 30(5) and 6 of [\*Land Adjudication Act\*](#) which was confirmation by the Adjudication Officer that the adjudication process was complete.
46. The respondent contends that it is not in dispute that the respondent was originally the registered owner of land parcel No Maua/amwathi/9151, and that the contention was how the parcel was transferred from the respondent to the appellant.



47. The respondent submitted that in compliance with the lower court judgment the suit land was registered in his name but the appellant again fraudulently caused the same to be registered under his name as evidenced by the copy of the title deed attached to his submissions. The respondent attached a copy of the respondent's title deed issued on November 15, 2015 to his submissions.
48. The respondent submitted that the role of the court is to determine rights in land once the adjudication process is complete and therefore the respondent submitted that the learned trial magistrate had the jurisdiction to hear and determine the matter.
49. The respondent submitted that the trial magistrate's judgment is correct and should be upheld and prayed that the appeal be dismissed with costs.

### **Analysis And Determination**

50. I have perused and considered the record of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. There are only two issues I find call for determination;
  - i. Whether the trial court had jurisdiction to entertain the claim.
  - ii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.
51. Regarding the first issue, the appellant submitted that the trial magistrate did not have any jurisdiction to reverse a decision and or registration obtained pursuant to a decision in objection proceedings under Section 26 (1) and (2) of the *Land Adjudication Act*, Cap 284 Laws of Kenya. The appellant's counsel submitted that that jurisdiction is a pure preserve of the minister whose decision is final as provided for under section 29 (1) and ( b) of the said Act. According to the appellant, the trial magistrate literally overlooked the said mandatory provisions of law and sought to reverse and/or review and altogether set aside the decision of the Land Adjudication Officer in objection No 1973. The appellant argued that the respondent having not appealed against the decision in objection No 1973, the adjudication register of the suit land became final under Section 26 A (1) of the said Act thereby resulting in issuance of registration and title to the appellant under Section 26 A(1) (b) of the Act. That the other option that was available for the respondent was to file Judicial Review proceedings to quash the decision in AR Objection No 1973 which too, he never did.
52. On his part, the respondent denied the existence of such objection proceedings and faulted the appellant for introducing fresh evidence on appeal.
53. In the case of *Owners Of Motor Vessel 'Lillian S' v Caltex Oil Kenya Limited [1989] KLR 1*, Nyarangi JA held as follows;

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction'.



54. In the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others* [2012] eKLR, the Supreme Court stated as follows;

' A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it is not one of procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.'

55. The issue therefore is whether the trial court did not have jurisdiction over the matter herein. In deciding this, it is important to look at the provisions of section 26, 26A, 29 and 30 of the Land Adjudication Act Cap 284 which provide that :

26. Objection to adjudication register

- (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.

26A. No objection register-

- (1) When the time for objection under Section 26(1) has expired, the Adjudication Officer shall prepare a No objection Register in respect of any land not subject to an objection, and deliver the same to the director of Land Adjudication who shall;
  - (a) Certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final, and
  - (b) Forward the No objection register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under Section 28.
- (2) The provisions of this section shall apply to all adjudication register not yet finalized before its commencement.

29. Appeal

- (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.
- (2) The minister shall cause copies of the order to be sent to the director of Land Adjudication and to the Chief Land Registrar.
  - (3) When the appeals have been determined, the director of Land Adjudication shall-
    - (a) Alter the duplicate register to confirm with the determination, and
    - (b) Certify on the duplicate adjudication register that it has become final in all respects and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

30. Staying of land suits.

- (1) Except with the consent in writing of the Adjudication Officer, no person shall institute and no court shall determine, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
- (2) Where any such proceedings were begun before the publication of the notice under Section 5 of this Act, they shall be discontinued, unless the Adjudication Officer, having regard to the stage which the proceedings have reached, otherwise directs.
- (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty eight days after the refusal, appeal, in writing to the minister whose decision shall be final.



- (4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed if at the time this act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.
- (5) A certificate signed by an adjudication officer certifying land to be or to have become on a particular date, land within an adjudication Section shall be conclusive evidence that the land is such land.
- (6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.'

56. Going by the above provisions of law, and in particular section 30, it is clear that no person shall institute, and no court shall entertain, any proceedings concerning an interest in land in an Adjudication Section until the adjudication register for that adjudication section has become final in all respects under Section 29 (3) of the Act.
57. I have perused the record of appeal. In the plaint dated June 5, 2012 the respondent herein pleaded that on March 4, 2019, the appellant in collusion with the then Demarcation Officer Maua/Amwathi Adjudication Section fraudulently and secretly caused the respondent's land parcel No 9151 Maua/Amwathi to be transferred to the appellant's name, effectively depriving the respondent the whole property. The respondent listed the particulars of fraud and pleaded that the appellant was the current registered owner of the land parcel number Maua/Amwathi/9151 measuring 0.15 acres or thereabouts. The respondent's claim against the appellant was for cancellation of the transfer of the suit land to the appellant and a declaration that the same belongs to the respondent. The record shows that the appellant filed a defence dated June 22, 2012 where he denied the claim.
58. I have also perused the evidence adduced by the parties herein and their witnesses. What came out from the pleadings and the evidence tendered is that the land was transferred from the respondent to the appellant. The respondent's case was that the land was transferred fraudulently. From the material on record it was not stated that the land was still under adjudication section. The trial court was also not informed the date upon which a notice of completion of adjudication register was published, if at all. It is also clear that it was not brought out clearly to the attention of the trial court that any notice of completion of adjudication register was ever published and when. All that came out was that objection proceedings took place in the absence of the respondent and the land was transferred to the appellant. The appellant produced proceedings dated March 4, 2009 (D exhibit 1) in AR objection No 1973 in which he stated that the committee decided in his favour and registered him as owner of the land. His evidence was that the respondent was issued with summons but did not appear. Whereas it was not brought to the attention of the trial court that any notice of completion of adjudication register was ever published, the parties proceeded as though the adjudication register for the suit land had become final, and the only issue before the court was whether or not the land was transferred secretly and fraudulently as pleaded.



59. That notwithstanding, the respondent has presented a copy of title deed in his name (though irregularly) which to me is prima facie evidence that the process of adjudication was concluded and title deed issued. The role of the court was to determine rights of land including cancellation of title, once the adjudication process was complete. Therefore in my view, the learned trial magistrate had the jurisdiction to determine the matter. In my view, the respondent was justified in filing the suit before court since the adjudication process was already complete and land transferred and registered in the name of the appellant and determine whether the title issued should be cancelled or not.
60. The other issue is whether the decision of the learned trial magistrate was against the weight of the evidence and the law. The court has carefully perused the record. The respondent testified that the appellant had leased the suit land from him and paid the sum of Kshs 5,000/= and that the respondent's wife would go to the appellant and would be given some money though the same was not recorded. He denied transferring the land to the appellant and testified that he did not participate in the proceedings that led to the transfer of the land.
61. On his part, the appellant's evidence was that he was sold the land by the respondent. It was his evidence that he called the respondent's step mother (now deceased) the respondent's brothers, Samuel Kalinge and Samson Kithure and his wife Jane Karimi and discussed about the sale of the land. The appellant testified that the agreed purchase price of the land was Kshs 40,000/= and which he stated he paid by installments. The issue to consider was whether fraud had been proved against the appellant.
62. In her judgment, the learned trial magistrate considered that from the evidence presented, no written agreement for sale of the land in dispute was presented before court and that the proceedings before the Meru North District Amwathi/Maua Adjudication Section proceeded in the absence of the respondent. The trial Magistrate noted that orders were issued even after the respondent had informed the panel that there was an outstanding balance of Kshs 6,000/=. That despite the fact that the appellant stated that he purchased the land from the respondent, there was no valid agreement presented between the parties and the appellant also failed to prove that he paid the consideration in full. The trial court held that even if there was a valid agreement for sale, the appellant had not proved that he complied with his part of the agreement. That all the witnesses including the appellant's witnesses confirmed that the respondent owned the land before it was transferred to the appellant.
63. Whenever a court of law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the law, and specifically the provisions of Section 3 (3) of the Law of Contract Act. In this case, the trial magistrate considered the said provision which states:
- ' No suit shall be brought upon a contract for the disposition of an interest in land unless;
- a. The contract upon which the suit is founded-;
- I. Is in writing,
- II. Signed by all the parties thereto, and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party'
64. In my view, the trial court correctly addressed herself to the above issue. Further, to succeed in a claim of fraud, a party not only need to plead but must also adduce water tight evidence upon which the court would make its finding. It is also settled law that fraud is a very serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable



doubt. See case of *Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR*; *RG Patel v Lalji M Jakani* cited in the case of *Gladys Wanjiru Ngancha v Theresa Chepsaat & 4 others [2013] eKLR* and *Central Bank of Kenya v Trust Bank Ltd & 4 others [1996] eKLR*.

65. In this case the respondent's case was that the transfer of his land was facilitated by fraud of the appellant in collusion with others. The appellant did not present an agreement for sale of land between him and the respondent. The Appellant also failed to prove that he paid the consideration for the land in full. It is also evident from the material on record that the appellant filed objection proceedings at the lands office which were heard and determined in the absence of the respondent and the land transferred to the appellant pursuant to orders emanating from those proceedings. It is my finding that the learned trial magistrate correctly found that the appellant failed to prove that the suit land was legally sold and transferred to him by the respondent.
66. Considering the totality of the evidence 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 she made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.
67. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondent.
68. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022**

**IN THE PRESENCE OF**

**Court Assistant Kibagendi**

No appearance for appellant

No appearance for respondent

**C.K YANO**

**ELC JUDGE**

