



**Sakwa v Masanga (Environment and Land Appeal E037 of 2021)  
[2022] KEELC 15148 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15148 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E037 OF 2021  
DO OHUNGO, J  
DECEMBER 5, 2022**

**BETWEEN**

**JOSEPH MALALA SAKWA ..... APPELLANT**

**AND**

**MWANAISHA APIO MASANGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. W. K Cheruiyot, Senior Resident Magistrate) delivered on 13th August 2021 in Mumias MCL & E No. 143 of 2018)*

**JUDGMENT**

1. Litigation leading to this appeal started on 8<sup>th</sup> May 2012 when the respondent herein, in her capacity as legal representative of the estate of her husband Ali Okwang'a Masanga (deceased), filed Kakamega HCCC No. 113 of 2012 through plaint dated 8<sup>th</sup> May 2012. She named the appellant herein as the first defendant. Henry Makokha Ouma, Kassim Wesonga Shikungu and Bernard Kweyu were named as the second to fourth defendants respectively. The matter was later transferred to this court as ELCC No. 466 of 2014, then to the Chief Magistrate's Court at Kakamega as Kakamega CM ELC No. 58 of 2017 and finally to Senior Principal Magistrate's Court at Mumias as Mumias SPM ELC No. 143 of 2018. The initial plaint was replaced with amended plaint dated 20<sup>th</sup> November 2018.
2. The respondent averred in the amended plaint that she was the registered proprietor of Land Parcel No. N. Wanga/Indangalasia/463 which was fraudulently subdivided into numbers N. Wanga/Indangalasia/882, N. Wanga/Indangalasia/883 and N. Wanga/Indangalasia/998 and registered in the names of the defendants. That her late husband only sold 2 acres of land to the appellant in two different portions of 1 acre each but by means of fraudulent tricks, the appellant acquired two titles N. Wanga/Indangalasia/882 and N. Wanga/Indangalasia/883 measuring 10 acres and 2 acres respectively resulting in 9 acres in excess. The respondent therefore prayed for judgment against the defendants named in the amended plaint for a declaration that the subdivision and subsequent transfer of land



parcel number N. Wanga/Indangalasia/463 are null and void for all purposes, for cancellation of resulting titles being N. Wanga/Indangalasia/882, 883, 884, 993, 994, 995, 996, 998 and any other subsequent subdivision, reversion of N. Wanga/Indangalasia/463 to her deceased husband's name and for costs of the suit.

3. The appellant filed his statement of defence dated 11<sup>th</sup> June 2019 wherein he denied the respondent's allegations and further stated that he purchased 2 acres of land from the respondent's late husband who further sold to him 2 acres of land on 26<sup>th</sup> June 1997. That on 21<sup>st</sup> September 1999, the respondent's late husband, his wife and children further sold to the appellant 10 acres of land. He therefore prayed that the suit be dismissed with costs.
4. Upon hearing the matter, the subordinate court (Hon. W K Cheruiyot, Senior Resident Magistrate) found merit in the respondent's case and therefore allowed it with costs as prayed and further ordered that the respondent transfers the non-disputed 2 acres to the appellant.
5. Aggrieved by the judgment, the appellant filed this appeal praying that the judgment be set aside. Henry Makokha Ouma, Kassim Wesonga Shikungu and Bernard Kweyu who were the second to fourth defendants respectively in the suit before the subordinate court were not made parties to this appeal. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
  1. The learned Honorable Magistrate erred in law and in fact at arriving at the said decision without taking into consideration that no fraud was ever proved by the plaintiff against the defendant/appellant through a criminal case.
  2. The learned Honorable Magistrate erred in law and in fact at arriving at the said decision by taking into consideration the plaintiff's evidence and failing to consider the evidence of the defendant/ appellant who tabled all the required documents to proof his case.
  3. The learned Honourable Magistrate erred in law and in fact at arriving at the said decision by not taking time to scrutinize and or appreciating all of the defendant's evidence produced thereby on trial and considering them as tangible evidence to defendant's defence.
  4. The learned Honorable Magistrate erred in law and in fact at arriving at the said decision by not putting into consideration of the issue of time barred.
  5. The learned Honourable Magistrate erred in law and in fact at arriving at the said decision by relaying on ignorance of signing the documents without evidence that really the plaintiff/respondent was not aware on what he was signing and yet the whole transaction was being done in accompany of plaintiff's sons and who also made a declaration over the same.
  6. The learned Honorable Magistrate erred in law and in fact at arriving at the said decision by not taking into consideration that the defendant had been issued with land title deed which can only be issued after certifying the registrar of lands i.e He violated section 6 (i) of *Land Control Board Act*.
6. The appeal was canvassed through written submissions. The appellant filed his submissions on 13<sup>th</sup> June 2022. He submitted that the learned magistrate erred in law and fact in arriving at the said decision without considering that fraud was not proved. In submitting that where one intends to impeach a title on the basis of fraud or misrepresentation then he needs to prove that the title holder was a party



to the fraud or misrepresentation, the appellant relied on [Kuria Kiarie & 2 others -v- Sammy Magera](#) [2018] eKLR.

7. The appellant further submitted that the learned magistrate acknowledged in the judgement that the appellant was entitled to only 2 acres of land based on the front page of Pexh 2 which he deemed to be the only valid transaction under the [Law of Contract Act](#) yet completion of payment of the purchase price was captured at the back page of the said exhibit, which validated the contract. That the respondent's acknowledgement of only the front page of the agreement while rejecting the back page was intended to deny the defendants in the case before the subordinate court land which they purchased from the deceased.
8. Arguing that the respondent had not satisfied the requirements of Section 26 (1) (a) of the [Land Registration Act](#) to warrant cancellation of the title, the appellant maintained that no evidence was adduced to show that he was a party to fraud or misrepresentation. That the appellant could not have subdivided the land belonging to the deceased, give him titles for land parcel numbers N. Wanga/Indangalasia/880 and 881 and retain titles for land parcel numbers N. Wanga/Indangalasia/882, 883 and 884 and the deceased be comfortable with the same. The appellant therefore urged the court to allow the appeal.
9. The respondent filed her submissions on 1<sup>st</sup> April 2022 and argued that the learned trial magistrate was right in finding that there was only one agreement signed by the appellant and the respondent's husband concerning sale of 2 acres only. That no other agreement was produced to show that the respondent's deceased husband sold another piece of land and that the only narration on the sale agreement was neither witnessed by any party nor signed by the deceased. That the purported addendum to the agreement was neither signed by all parties nor witnessed by any party contrary to Section 3 (3) of the [Law of Contract Act](#) and that there was consequently fraud since it cannot qualify to be an agreement. That the rest of the documents leading to the title deed are null and void.
10. On the issue of whether the suit was time barred, the respondent submitted that the suit concerns fraud and that in such cases, time starts running after discovery of the fraud. That although the fraud in the matter at hand was perpetuated between 15<sup>th</sup> April 1998 and 10<sup>th</sup> May 2004, it was not discovered until the appellant went to the land in 2004 after which the late respondent's husband sued the appellant at Mumias Resident Magistrate's Court, which suit was rejected upon which the respondent promptly filed this suit on 8<sup>th</sup> May 2012, barely 8 years after the fraud of 2004. That the 12 years after discovery of fraud required under Section 26 of the [Limitation of Actions Act](#) had not lapsed. The respondent therefore urged the court to dismiss the appeal with costs.
11. This being a first appeal, this court's mandate is well spelt out. The court should re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.
12. With the above general guidelines in mind, I have carefully considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether fraud was established and whether the reliefs sought in the amended plaint dated 20<sup>th</sup> November 2018 were merited.



13. From the material that was placed before the learned trial magistrate by the respondent, it is apparent that Masanga Okwang' became the registered proprietor of land parcel number N. Wanga/Indangalasia/463 measuring 33 acres on 27<sup>th</sup> December 1967 and that the register in respect of the said parcel was closed on 15<sup>th</sup> April 1998 upon its subdivision into N. Wanga/Indangalasia/880, 881, 882, 883 and 884. As at the date of the said subdivision, Masanga Okwang' was alive. He passed away ten years later, on 30<sup>th</sup> April 2008. Land parcel numbers N. Wanga/Indangalasia/880 and 881 were registered in the name of Masanga Okwang', N. Wanga/Indangalasia/882 and 883 were registered in the name of the appellant while N. Wanga/Indangalasia/884 was registered in the name of Kassim Wesonga Shikanda. All the registrations took place in 1998 save for N. Wanga/Indangalasia/882 which was registered in the name of the appellant in the year 2000.
14. As of 8<sup>th</sup> May 2012, when the respondent commenced the litigation herein, the [Land Registration Act](#) was in force. Pursuant to Section 24 of the Act, a registered proprietor of land is by law accorded specific privileges and benefits. The said section provides as follows:
24. Interest conferred by registration  
Subject to this Act -
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ....
15. Further, under Section 26 of the Act, the trial court was required to accept the respective certificates of title as proof of ownership. That said, a title can be nullified if it is shown that it was acquired through fraud or misrepresentation to which the registered proprietor is proved to be a party or if it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:
26. Certificate of title to be held as conclusive evidence of proprietorship
- (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—
- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
16. The respondent attacked the title documents solely on the basis of allegations of fraud. Fraud is a serious allegation. It is for that reason that the law requires that an allegation of fraud be pleaded, particularised, and strictly proven on a standard higher than that required in ordinary civil cases. This



was restated by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR as follows:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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; 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. ...

17. The respondent particularised fraud against the appellant in her amended plaint thus: subdividing land parcel number N. Wanga/Indangalasia/463 without the deceased’s consent, causing the subdivision of the said parcel and its transfer without the consent of the Land Control Board, taking advantage of the deceased’s illiteracy to cause him to sign documents without proper explanation, falsely presenting himself to the Land Control Board without the deceased, transferring the subdivisions of N. Wanga/Indangalasia/463 to various people who the deceased had no transactions with, subdividing the land without surveying it and making demarcation on the ground and acquiring more acreage than the ones agreed upon with the deceased.
18. Did the respondent strictly prove those particulars of fraud to the applicable standard which is higher than that required in ordinary civil cases? I am not persuaded that she did. As noted earlier, land parcel number N. Wanga/Indangalasia/463 was subdivided in 1998 during the deceased’s lifetime. The deceased passed way ten years later in 2008. The respondent’s own evidence was that the deceased and the appellant entered into an agreement in 1997 pursuant to which the deceased sold 2 acres of N. Wanga/Indangalasia/463 to the appellant. In those circumstances, I do not see how it can be said that the appellant subdivided land parcel number N. Wanga/Indangalasia/463 without the deceased’s consent. The subdivision was a natural and logical consequence of the sale transaction.
19. Among the particulars of fraud was the allegation that the appellant took advantage of the deceased’s illiteracy to cause him to sign documents without proper explanation. No evidence was adduced to demonstrate the illiteracy or its alleged effects, more so considering that it was conceded that the deceased sold 2 acres to the appellant through a written agreement. Regarding the question of consent of the Land Control Board, I found the particulars as pleaded to be contradicting and self-defeating since on one hand it is claimed that the appellant caused the subdivision without the consent of the Land Control Board, while on the other hand it is claimed that the appellant falsely presented himself to the Land Control Board without the deceased.
20. Regarding the allegation that the appellant acquired more acreage than what was agreed upon with the deceased, I note that the agreement that was produced by the respondent had entries at the back which indicate that the deceased and his son received various payments between 21<sup>st</sup> September 1999 and 19<sup>th</sup> May 2000 being payments for land adding up to 14½ acres. The learned trial magistrate was of the view that the said transactions did not constitute a valid contract for the disposition of an interest in land as required by Section 3 (3) of the *Law of Contract Act*.
21. Section 3 (3) of the *Law of Contract Act* provides in part as follows:

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) is 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 ...

22. The suit that was filed by the respondent did not seek to enforce a contract for the disposition of an interest in land. Instead, it sought nullification of titles on account of fraud. I do not see how non-compliance with Section 3 (3) of the [Law of Contract Act](#), even if any were to be demonstrated, would amount to proof of fraud.

23. In view of the foregoing discourse, I find that the respondent neither established fraud nor demonstrated that the appellant was party to fraud. That being the case, the requirements for nullification of title on account of fraud under Section 26 of the [Land Registration Act](#) were not met. Consequently, the reliefs which the respondent sought in the amended plaint dated 20<sup>th</sup> November 2018 were not merited and ought not to have been granted. It follows therefore that this appeal succeeds.

24. I therefore make the following orders:

- a. This appeal is allowed.
- b. The judgment and decree of the Senior Principal Magistrate’s Court at Mumias delivered on 13<sup>th</sup> August 2021 in Mumias MCL & E No. 143 of 2018 is hereby set aside and is replaced with an order dismissing the said suit.
- c. The appellant shall have costs of this appeal as well as costs of the suit in the subordinate court.

**Dated, signed, and delivered at Kakamega this 5<sup>th</sup> day of December 2022.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Masakhwe for the appellant

No appearance for the respondent

Court Assistant: E. Juma

