



**Etemesi v Kokoyo (Environment and Land Appeal E031 of 2022)
[2025] KEELC 224 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E031 OF 2022
DO OHUNGO, J
JANUARY 30, 2025**

BETWEEN

REUBEN LUBANGA ETEMESI APPELLANT

AND

MARGARET OMUSUNDI KOKOYO RESPONDENT

*(Being an appeal from the judgment of the Senior Principal Magistrate's
Court at Butere (Hon. B. Ojoo, Senior Principal Magistrate)
delivered on 5th July 2022 in Butere MCELC No. 15 of 2019)*

JUDGMENT

1. The background of this appeal is that the Appellant moved the Subordinate Court through Plaint dated 16th May 2019 wherein he averred that he was the registered proprietor of land parcel number Marama/Buchenya/1723 while the Respondent was the registered proprietor of land parcel number Marama/Buchenya/1724. He added that the two parcels border each other, and that the Respondent had trespassed on to a road of access serving both parcels, blocked it and started constructing structures thereon. The Appellant therefore sought judgment against the Respondent for eviction and a permanent injunction restraining her together with her agents from constructing illegal structures or accessing the road.
2. The Respondent reacted by filing a Defence and Counterclaim in which she admitted being proprietor of Marama/Buchenya/1724 but denied the allegations of trespass. She further averred that the Appellant obtained title to Marama/Buchenya/1723 through fraud. The Respondent therefore sought dismissal of the Appellant's case and judgment against the Appellant for declarations that the Appellant obtained title to Marama/Buchenya/1723 through fraud and that the Appellant's title "be dispensed with" on account of fraud so that title to Marama/Buchenya/1723 reverts to her. She also prayed for costs.



3. Upon hearing the matter, the Subordinate Court (Hon. Hon. B. Ojoo, Senior Principal Magistrate) delivered judgment on 5th July 2022. The Learned Magistrate dismissed the Appellant's case and ordered rectification of the register in respect of Marama/Buchenya/1723 to cancel the Appellant's name as proprietor and to revert title thereto in the Respondent's name. The Learned Magistrate further ordered eviction of the Appellant from the said parcel within 90 days of the date of the judgment and condemned the Appellant to pay costs.
4. Dissatisfied with the outcome, the Appellant filed this appeal on 3rd August 2022, through Memorandum of Appeal dated 3rd August 2022. He prayed that the appeal be allowed, the judgment of the Subordinate Court be set aside, that his claim be allowed and that the Respondent's Counterclaim be dismissed.
5. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:
 1. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent's Counter Claim dated 17th November 2021 was untenable and incompetent for failing to enjoin (sic) the County Land Registrar rendering the said Counter Claim incompetent.
 2. That the Learned Trial Magistrate erred in law and fact by failing to find the issues before her were boundary disputes in respect of land parcel known as MARAMA/BUCHENYA/1724.
 3. That the Learned Trial Magistrate erred in law and fact in failing to find that the Respondent's claim was, for all intents and purposes, statute barred.
 4. That the Learned Trial Magistrate erred in law in failing to hold that the Appellant had exclusive use of the said suit land MARAMA/BUCHENYA/1724 yet it was clear from the evidence on record that the Appellant is in actual, open continuous, peaceful and utilization of the said suit land in total exclusion of the Respondent.
 5. That the Learned Trial Magistrate erred in law and fact that the Respondent failed to prove the particulars of fraud as alleged.
 6. That the Learned Trial Magistrate failed to take into account the Appellant's suit.
6. The appeal was canvassed through written submissions. The Appellant argued that since the Respondent was seeking cancellation of titles, failure to join the Land Registrar was fatal to her case. He relied on the cases of *Quinto Ocheruk, Vincent Omusugu & Philip Omunyu v Alex Emojong* [2018] eKLR and *Simon Njagi Njoka v James Gatimu Muriithi, Leonard Muriithi Marithuku, Johnson Chege Mwangi, Gatimu Kanyi, Joseph Muriuki Gatimu & Fausto Mwai Gatimu* [2019] eKLR in support of that contention.
7. The Appellant went on to fault the Learned Magistrate for not holding that the dispute before her was a boundary dispute since there was an allegation of blockage of a road of access. He also contended that the Learned Magistrate erred in not holding that the Appellant had been in exclusive and continuous use of parcel number Marama/Buchenya/1724, yet there was evidence to that effect on record. Relying on the case of *Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro* [2022] eKLR, he argued that the Learned Magistrate erred in holding that he had failed to prove fraud. He concluded by urging this Court to allow the appeal with costs.
8. On her part, the Respondent argued that failure to join the Land Registrar was not fatal since the Subordinate Court had power under Section 80 (1) of the [Land Registration Act](#) to order the Land



- Registrar to rectify the register and since the particulars of fraud were not directly pleaded against the Land Registrar. She further argued that her counterclaim for cancellation of the Appellant's title was within the jurisdiction of the Subordinate Court pursuant to Section 9 (a) (i) of the Magistrate's Courts Act and further that the question of whether her counterclaim was statute barred cannot be canvassed before this Court since it was never raised before the Subordinate Court. She also argued that she had established fraud and that the appeal ought to be dismissed with costs for want of merit.
9. This is a first appeal. Consequently, this court's remit is to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
 10. I have considered the grounds of appeal, the pleadings, the evidence and the parties' submissions. The issues that arise for determination are whether the Respondent's claim was incompetent for non-joinder of the Land Registrar, whether the Appellant had established his case, whether the Respondent established fraud and whether the parties were entitled to the reliefs that they respectively sought.
 11. The issue of whether the Respondent's claim was incompetent for non-joinder of the Land Registrar finds ready answer in Order 1 Rule 9 of the Civil Procedure Rules which provides:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
 12. Further, pursuant to Order 1 Rule 3, a Plaintiff is only required to join as Defendants, such persons against whom she has a right to relief. A perusal of the Respondent's counterclaim shows that she did not seek any relief against the Land Registrar. If the Appellant was of the view that the Land Registrar was a necessary party, he had the liberty to seek to join him either as a co-defendant or as an interested party. I find that the Respondent's claim was competent and that non-joinder of the Land Registrar had no adverse effect on it.
 13. I now turn to the question of whether the Appellant had established his case. As summarised in the opening paragraph of this judgment, the Appellant's case before the Subordinate Court was that he was the registered proprietor of land parcel number Marama/Buchenya/1723 which borders the Respondent's land parcel number Marama/Buchenya/1724. He accused the Respondent of trespassing on to a road of access serving both parcels, blocking it and starting construction of structures thereon. To have any prospect of success, the Appellant was required to prove that he had a valid title to Marama/Buchenya/1723 in view of the Respondent's Defence and Counterclaim in which she denied the allegations of trespass and sought nullification of the Appellant's title to the said parcel on grounds of fraud.
 14. A registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Pursuant to Section 26 of the Act, courts are obligated to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The provisos limit the grounds on which a title can be nullified to fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
 15. Any allegation of fraud in a civil case is considered a grave matter. A party alleging fraud must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt.



See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.

16. As correctly held by the Learned Magistrate, both parcels Marama/Buchenya/1723 and Marama/Buchenya/1724 were subdivisions of Marama/Buchenya/1490. The Respondent was the proprietor of Marama/Buchenya/1490 as well as the subdivisions. The Appellant claimed that he acquired Marama/Buchenya/1723 by way of purchase from one Wycliffe Wakhu. The said Wycliffe Wakhu was not the registered proprietor. Among particulars of fraud that the Respondent pleaded against the Appellant were that he obtained title in the absence of a sale agreement or consideration and by use of an unsigned transfer. The Respondent testified that she did not sign the instrument of transfer that the Appellant used to obtain title. The Appellant neither dislodged that position nor demonstrated any sale transaction with the Respondent as registered proprietor.
17. I am satisfied that the Respondent established fraud and met the requirements for nullification of the Appellant's title. Without a valid title, the Appellant's claim had no leg on which to stand. It follows therefore that the Appellant was not entitled to the reliefs that he had sought. On the other hand, the Respondent established her counterclaim and was thus entitled to relief.
18. In view of the foregoing, I find no merit in this appeal. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 30TH DAY OF JANUARY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

The Appellant present

The Respondent present

Court Assistant: B Kerubo

