



REPUBLIC OF KENYA



**Jelimo & another v Chumba (Environment and Land Appeal  
E006 of 2023) [2025] KEELC 433 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 433 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT AND LAND APPEAL E006 OF 2023  
GMA ONGONDO, J  
FEBRUARY 10, 2025**

**BETWEEN**

**ANN JELIMO ..... 1<sup>ST</sup> APPELLANT**

**CHARLES KIPROTICH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SELLAH JELAGAT CHUMBA ..... RESPONDENT**

*(An appeal arising from the judgment and decree in Kapsabet Chief Magistrate's Court  
Environment and Land Case No. E006 of 2021 by Hon. D.A. Ocharo, SPM on 22nd March 2023)*

**JUDGMENT**

1. On 22<sup>nd</sup> March 2023, the trial court (Hon. D. A. Ocharo, SPM) entered judgment in terms of the orders sought in the plaint dated 7<sup>th</sup> January 2021 inclusive of costs and proceeded to dismiss the defendant's counter claim dated 28<sup>th</sup> January 2021 with costs to the plaintiff.
2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants who are the appellants herein, were aggrieved thereby. Therefore, through Messrs Ngigi Mbugua and Company Advocates, the appellants lodged this appeal by way of the memorandum of appeal dated 27<sup>th</sup> March 2023 founded upon the grounds infra;
  - a. The Learned Magistrate erred in law and in fact in entering a judgment in favour of the respondent as against the appellants ignoring the weight of evidence adduced by the appellants hence arriving at a decision that was wholly erroneous.
  - b. The Learned Magistrate erred in law and in fact by failing to appreciate that the 1<sup>st</sup> appellant inherited the land by virtue of her marriage under Nandi Customary Law in a union known as woman to woman marriage.



- c. The Learned Magistrate erred in law and in fact in proceeding on the unfounded and false assumption that the respondent had acquired the suit land, Nandi/Ndurio/788, by virtue of a will with no proof on whether the will was ever the subject of succession proceedings leading to confirmation of grant.
  - d. The Learned Magistrate erred in law and in fact in reaching a decision agreeing with the respondents' suit as against the appellant in which the respondent claims to have acquired the suit land while the original owner was still alive and well as she died 3 years later in 2007 thus, the alleged will by the respondent is suspect ab initio and cannot be the basis of acquisition of the suit land.
  - e. The Learned Magistrate erred in law and in fact in reaching a decision agreeing with the respondent that the appellants were obligated to give vacant possession of the suit land to the respondent, which decision was inhuman, draconian, disproportionate and unreasonable in the circumstances of the case.
  - f. The Learned Magistrate erred in law and in fact in failing to perceive that the matter by dint of the impugned will moved from a matter of claim of ownership of the suit land to a suspected fraud.
  - g. The Learned Magistrate erred in law and in fact in showing open biasness by being hostile to the appellant during the entire court proceedings and making a judgment based only on the respondent's submissions.
3. Thus, the appellants are seeking that the appeal be allowed and the decree and judgment of the trial court be set aside and substituted with a decision allowing the appellants' counterclaim with costs.
  4. Hearing of the appeal was by way of written submissions pursuant to the directions of the court issued on 5<sup>th</sup> November 2024.
  5. The appellants' counsel, Ngigi Mbugua & Company Advocates, filed submissions dated 18<sup>th</sup> December 2024 and identified two issues for determination thus: whether the claim for fraud was proved and whether the trial court's decision to allow the plaintiff's claim should stand. Learned counsel submitted that the appellant pleaded and proved fraud at the trial court since the respondent's claim to the suit land was through a will which was executed and fulfilled during the lifetime of the executor. That title to the suit land was issued on 18<sup>th</sup> August 2004 yet the deceased, Taprandich Jepkemboi Talam, died in 2007. That the deceased was the customary husband to the 1<sup>st</sup> appellant herein. Thus, he urged the court to set aside the decision of the trial court and allow the instant appeal. To reinforce the submissions, reliance was placed on various authoritative pronouncements including *Vijay Morjaria-vs-Nansingh Madhusingh Darbar* (2000) eKLR and *Kinyanjui Kamau-vs-George Kamau Njoroge* (2015) eKLR.
  6. By the submissions dated 10<sup>th</sup> December 2024, the respondent's counsel, Rioba Omboto and Company Advocates, gave a background of the case and identified four issues for determination inter alia;
    - a. Whether the court arrived at a decision that is against the weight of evidence.
    - b. Whether the respondent is the legal owner of the suit land.
    - c. Whether the appellants' claim of inheriting the suit land is merited.
    - d. The appellate court's jurisdiction and/or mandate.



7. Learned Counsel submitted that the original land known as L. R. No. Nandi/Ndurio/319 measuring 4.2 Ha belonged to the late Talam Taprandich (hereinafter called the deceased). That vide a will dated 15<sup>th</sup> October 2001, the deceased bequeathed the original land to her beneficiaries as follows: the respondent – 2.64 Ha, the 1<sup>st</sup> appellant- 3 acres and one Philemon K. Chumba- 0.5 acres. That together with the deceased, the respondent subdivided the original land into three parcels to wit; the suit land, L. R. No. Nandi/Ndurio/789 and 790. That thereafter, she applied and was issued with a title deed in respect of the suit land. That the said Philemon also obtained title to his portion. That, however, the 1<sup>st</sup> appellant did not apply to be issued with a title deed for her portion of the original land. That the validity of the will of the deceased remains unchallenged to date and her wishes therein were actualized during her lifetime.
8. Furthermore, counsel stated that the present dispute has been the subject of litigation in two separate suits that is; Civil Suit No. 188 of 2003 at Kapsabet Law Courts and HCC Suit No. 112 of 2004. That in the former, eviction orders were issued against the 1<sup>st</sup> appellant herein on 13<sup>th</sup> October 2005. That the respondent lawfully obtained the title to the suit land. Thus, counsel urged the court to dismiss the instant appeal with costs. To buttress the submissions, counsel relied on the following authorities: Muriithi vs Gathua [2024] KEHC 6734 (KLR), Banks vs Goodfellow (1870) LR 5 QB 549 and Re In the matter of the Estate of the Late Sospeter Kimani Waithaka Succession Cause No. 341 of 1998.
9. It is important to note that the instant appeal being the first one from the trial court, this court has the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see Selle and another-vs-Associated Motor Boat Company Ltd (1968) 1 EA 123 and Peters-vs-Sunday Post (1958) EA 424 at 429.
10. Thus, the respondent who was the plaintiff at the trial court sued the appellants by way of a plaint dated 7<sup>th</sup> January 2021 over the suit land for;
  - a. A permanent injunction restraining the appellants, their agents and/ or family members and/ or any other person from entering into, occupying, encroaching, trespassing, fencing, building, ploughing, planting crops and/or in any way dealing with the respondent's quiet possession, use and enjoyment of the suit land and stopping them from doing any acts that are inconsistent with the respondent's right as the legal and/or rightful owner of the suit land.
  - b. An order of eviction forthwith removing the appellants, their agents, servants and/or family members to vacate, move and leave vacant possession of the suit land.
  - c. Costs of this suit.
  - d. Any such other or further relief as the honourable court may deem fit and just to grant.
11. In her evidence, the respondent (PW1) relied on her statement dated 23<sup>rd</sup> May 2022 which was adopted as part of her evidence and the list of documents filed on 24<sup>th</sup> May 2022 to wit, title deed for the suit land, a will dated 15<sup>th</sup> October 2001, a certificate of official search, eviction order in Kapsabet Civil Suit No. 188 of 2003 and photographs (PExhibits 1 to 5 respectively). She testified that the original land belonged to the deceased, who was her grandmother. That the deceased subdivided the same into three portions and bequeathed the portions to the parties herein, according to her will. That the suit land was among the subdivisions thereof and was bequeathed to the respondent and subsequently registered in her name during the lifetime of the deceased. That the 1<sup>st</sup> appellant lived with the deceased as her wife under the Nandi woman to woman customary marriage and was given a share of the original land. That however, she failed to register the portion under her name.



12. Under cross-examination, PW1 admitted that she has never lived on the suit land. That however, the appellants reside thereon.
13. The appellants opposed the suit by a Statement of Defence and Counterclaim dated 28<sup>th</sup> January 2021. They averred that the suit land was bequeathed to them by the 1<sup>st</sup> appellant's husband (the deceased herein) under Nandi Custom of woman to woman marriage, which was celebrated in 1978 and the 2<sup>nd</sup> appellant is a son of that union. Thus, they sought the orders infra:
  - a. A declaration that the suit land is their home by virtue of the marriage between the 1<sup>st</sup> appellant and the deceased, the late Taprandich Jelagat.
  - b. A declaration that the respondent is estopped from questioning the appellants' entitlement to the suit land having acquiesced to the customary marriage and having been aware of their long and uninterrupted stay on the same from 1978 to date.
  - c. A declaration that the appellants have acquired the suit land on account of effluxion of time and long and uninterrupted occupation of the same.
  - d. Permanent injunction against the respondent from laying claim or in any way interfering with the appellants' ownership and occupation of the suit land.
  - e. Costs of the counterclaim.
  - f. Any other or further relief the court may deem fit to grant in the circumstances.
14. DW1, Anne Jelimo (the 1<sup>st</sup> appellant), relied on her statement filed in court on 7<sup>th</sup> January 2022, which was adopted as part of her evidence and a list of documents dated 20<sup>th</sup> December 2021 serial numbers 1 to 5, DExhibits 1 to 5 respectively. She testified that the deceased was not blessed with any children hence, she married her under the Nandi Customary woman to woman marriage. That she has lived on the suit land since 1978 and is not aware that the deceased had a will.
15. Under cross-examination, she stated that the title deed of the suit land (PExhibit 1) is a forgery, since succession has not been done in respect to the estate of the deceased. That the original land still exists and no subdivision has been done. She admitted that she has never challenged the validity of the deceased's will.
16. DW2, Charles Kiprotich, relied on his statement dated 7<sup>th</sup> January 2022, which was adopted as part of his evidence. He associated himself with the evidence of DW1.
17. During cross-examination, DW2 conceded that the 1<sup>st</sup> appellant was given one of the portions resulting from the subdivision of the original land, to wit L.R No. Nandi/Ndurio/790.
18. In the foregone, the issues for determination herein are as set out on the grounds of appeal which crystallize to:
  - a. Whether the instant appeal is tenable?
  - b. Just orders to issue herein.
19. It is worth to note that the learned trial magistrate stated the parties' respective cases, delineated a single issue for determination, discussed it and reached the decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.



20. The Honourable trial magistrate observed that:

“...According to a copy of the register of the original land produced as Defence Exhibit 4, mutation was done on 4<sup>th</sup> August 2004 and the original title closed.... If there were questions to be raised, they should have been raised at that time the property was sub-divided by the original owner and transferred to three individuals in shares she pleased...”

21. Further, the trial court noted that:

“...The defendants have alleged fraud on the part of the plaintiff specifically with regard to the will executed in the year 2001 by the deceased.... She has failed to prove that fraud was done by the deceased in subdividing her parcel of land and transferring parcels in portions she pleased to the plaintiff, the 1<sup>st</sup> defendant and to one Philemon K. Chumba...”

22. Therefore, the Learned trial magistrate held that:

“...I am satisfied that the plaintiff has proved its case on a balance of probabilities. She is the registered owner of the suit property and to my mind she acquired proprietorship of the property during the lifetime of the original proprietor... The title shall not be subject to challenge except on the ground of fraud, which the defendants have not proved and where the registration has been acquired illegally, unprocedurally or through a corrupt scheme, which has equally not been proved...”

23. The appellants contend that the trial court failed to appreciate that the 1<sup>st</sup> appellant inherited the land by virtue of her marriage under Nandi Customary Law in a union known as woman to woman marriage. Section 3 (2) of the *Judicature Act*, Chapter 8 of the Laws of Kenya provides that:

The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

24. I note that it was not disputed that the 1<sup>st</sup> appellant was married to the deceased in a woman to woman marriage under Nandi Customary Law. I further note from the evidence adduced (PEXhibit 2) that the deceased did make provision for the 1<sup>st</sup> appellant by awarding her 3 acres out of the original land, to wit, L.R No. Nandi/Ndurio/790, although the said portion has not been registered in the name of the 1<sup>st</sup> appellant herein. Indeed, DW2 conceded during cross-examination that:

“...My mother (the 1<sup>st</sup> appellant) was given L.R No. Nandi/Ndurio/790...”

25. Clearly, the suit land was given to the respondent herein and the same was registered in her name on 18<sup>th</sup> August 2004 and a title deed duly issued. Notably, the subdivision of the original land and subsequent registration of the resultant parcels, particularly the suit land in the name of the respondent herein, occurred during the lifetime of the deceased, who was the owner of the original land.

26. The appellants lament that the learned trial Magistrate erred in law and in fact in proceeding on the unfounded and false assumption that the respondent had acquired the suit land by virtue of a will with no proof on whether the will was ever the subject of succession proceedings leading to confirmation



of grant. I have examined the entire record of the trial court and observe that the 1<sup>st</sup> appellant admitted that she had never challenged the validity of the deceased's will (PEXhibit 2). She stated in part that:

“... I have not complained before any authority on the authenticity of the will...”

27. Therefore, it is my considered view that having failed to lodge proceedings for revocation of the deceased's will, the appellants are bound by it. Besides, this court lacks jurisdiction to make a finding on the validity or otherwise of PEXhibit 2.

28. Further, it is noteworthy that the respondent acquired title to the suit land during the lifetime of the deceased. No succession proceedings were necessary in the circumstances. Thus, it is my considered view that the same amounts to a gift inter vivos as stated by Nyamweya J. in the case of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR that:

“...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

29. Furthermore, in *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 20(1)* at paragraph 67, it is stated in part that:

“...If a gift is to be valid, the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do...”

30. In the instant case, the deceased had the capacity and competency to gift the suit land to the respondent and others and such gift was perfected by way of transfer and registration. Therefore, the wishes of the deceased be honoured.

31. Regarding fraud, in *Black's Law Dictionary 10<sup>th</sup> Edition* at page 775, the term “Fraud” means;

“A knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment”

32. It is trite law that the existence of fraud cannot be inferred from the facts; see *Vijay Morjaria case (supra)*.

33. In the case of *Kinyanjui Kamau (supra)*, the Court of Appeal stated that;

‘...It is trite law that the allegations of fraud must be pleaded and strictly proved...’

34. In the instant case, the particulars of fraud on the part of the respondent were not set out in the statement of defence and counterclaim dated 28<sup>th</sup> January 2021. The appellants failed to distinctly plead and prove fraud as held in, inter alia, *Kamau case (supra)* and *Ngacha case (infra)*; see also *Ndolo vs Ndolo (2008) 1KLR (G&F) 742*. Thus, the same is mere allegation and not proved to the requisite standard.



35. Further, in the case of Gladys Wanjiru Ngacha-vs-Teresa Chepsaat and 4 others (2013) eKLR, the Court of Appeal cited R.G Patel-vs-Lalji Makani (1957) EA 314 at 317 and remarked;
- ‘...Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required...’
36. This court is cognizant that rights and registrations in respect of land can be challenged on grounds of fraud, misrepresentation and adverse possession; see Sections 26 (1) and 28 of the *Land Registration Act* 2016 (2012) and Salim-vs-Boyd (1971) EA 550 and Kimani Ruchine and another-vs-Swift Rutherford Company Ltd and another (1976-80) 1 KLR 1500.
37. In the case of Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR, the Court of Appeal was emphatic thus;
- ‘...When a registered proprietor’s root of title is under challenge.....the registered proprietor must.....prove the legality of how he acquired the title and show that the acquisition was lawful, formal and free from any encumbrances.....’
38. From the evidence on record, it is my considered view that the respondent proved the root of her title as envisioned in the Munyu Maina case (supra).
39. It is trite law that the legal burden of proof in a case is always static and rests on the claimant throughout the trial; see Kirugi and another–vs-Kabiya and 3 others (1987) KLR 347 and this is provided for in Sections 107 to 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya.
40. To that end, it is my considered view that the respondent proved her case on a balance of probabilities. However, the appellants failed to prove their case to the requisite standard. Consequently, there is no indication that the decision reached by the trial court was biased, hostile or based only on the respondent’s submissions. The learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned judgment. There is no reason to disturb his reasoned judgment and I affirm the same.
41. A fortiori, the instant appeal lodged by way of a memorandum of appeal dated 27<sup>th</sup> March 2023 is devoid of merit. It is hereby dismissed with costs to the respondent.
42. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAPSABET THIS 10<sup>TH</sup> DAY OF FEBRUARY 2025.**

**HON. G. M. A ONG’ONDO**

**JUDGE**

Present

1. Ms. Muganda Chelsea, Learned Counsel for the respondent
2. Walter, Court Assistant

