



REPUBLIC OF KENYA



Makilya & another v Simeon & another (Environment and Land Appeal E015 of 2022) [2025] KEELC 3931 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

EO OBAGA, J

MAY 22, 2025

BETWEEN

PETRONILLA MUTUKU MAKILYA 1ST APPELLANT

WINIFRED KATUNGWA KATHENDU 2ND APPELLANT

AND

ANASTACIA MBITHE SIMEON 1ST RESPONDENT

THE LAND REGISTRAR MACHAKOS 2ND RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate's court at Kilungu
Hon. F. Makoyo delivered on 18th August, 2022 in ELC No E011 of 2021)*

JUDGMENT

Introduction and Background.

1. The Appellants are sisters. The Appellants had filed a suit against the Respondent in Kilungu Principal Magistrate's court in which they sought the following reliefs:
 1. An order of cancellation of the title deed issued to the Defendant in respect to Konza North/Konza North Block 2 (Malili) 1XX5/7/X0 and the issuance of a new title deed in the names of the Plaintiffs.
 2. A declaration that all that piece of land known as Konza North/Konza North Block 2 (Malili) 1XX5/7/X0 belongs to the Plaintiffs.
 3. A permanent injunction do issue against the Defendants restraining them by themselves, their servants or agents from entering, dealing with, selling, alienating, charging or in any other way from interfering with the Plaintiffs' exclusive possession, use and occupation of all that piece of land known as Konza North/Konza North Block 2 (Malili) 1XX5/7/X0



4. General damages for the fraudulent transfer of the suit property.
 5. Costs of the suit to be borne by the Defendant.
 6. Any other orders this court may deem fit and just to grant.
2. The Appellants who were residing in the United States of America and South Africa respectively were contending that they had made an oral agreement for purchase of shares from the 1st Respondent at a consideration of Kshs.64,000/= . The Respondent was a member of Malili Ranch Limited. It was their evidence in the lower court that in X008, Malili Ranch Limited converted the shares into land and had the 1st Respondent registered as owner of LR No. Konza North/Konza North Block 2 (Malili)/1/45/7/X0.
 3. It was their contention that the Registration of the suit property in the 1st Respondent's name was fraudulent as the 1st Respondent had surrendered her membership card number, share certificate and card number to them upon her selling her shares to them. They listed two particulars of fraud against the 1st Respondent as fraudulently transferring the suit property into her names and failing to transfer the suit property into the Appellants' names.
 4. The 1st Respondent denied the Appellants' claim and put them on strict proof of their allegations. She denied being the registered owner of the suit property and stated that her plot No. was 145 and that she had nothing to do with plot 1XX5. In a judgment delivered on 18th August, X022, the trial magistrate dismissed the Appellants' suit holding that they had failed to prove their case against the Respondents.
 5. Aggrieved by the judgment, they preferred an appeal to this court in which they raised the following grounds of appeal:
 - a. The learned magistrate erred in law and fact by disregarding the Appellants' bundle of documents.
 - b. The learned magistrate erred in law and fact by disregarding the fact that the Appellants were in possession of the 1st Respondent's original membership cards and share certificate.
 - c. The learned magistrate erred in law and fact by disregarding the fact that the 1st Respondent never produced any documents as evidence of ownership of the suit property.
 - d. The learned magistrate erred in law and fact by disregarding the fact that the 1st Respondent did not produce her original membership card and share certificate as proof that she was a member of Malili Ranch Limited.
 - e. The learned magistrate erred in law and fact by disregarding the fact that the 1st Respondent had not reported the loss of her original membership card and share certificate.
 - f. The learned magistrate erred in law and fact in disregarding the fact that the 1st Respondent received the sum of Kenya shillings sixty four (Kshs.64,000/=) as consideration for the shares she sold to the Appellants.
 - g. The learned magistrate erred in law and fact in disregarding the fact the Appellants could not acquire possession of the suit property since Malili Ranch Limited acquired land for its shareholders in X018; then went ahead to distribute the same to them in the said year.
 - h. The learned magistrate erred in law and fact in disregarding the fact the 1st Respondent took advantage of the Appellants' absence in the country and went ahead to acquire the title deed to the suit property in X018.



- i. The learned magistrate erred in law and fact in disregarding the fact that before X018, Malili Ranch Limited did not own any land that it could have distributed to its shareholders.

Submissions by the parties.

6. The parties were directed to dispose of the appeal through written submissions. The Appellants filed their submissions dated X0th January, X025. The 1st Respondent filed her submissions dated 27th January, X025. The 2nd Respondent neither entered appearance nor filed a defence before the Kilungu Principal Magistrate's court. The 2nd Respondent did not equally file any submission in this appeal.

Analysis and Determination.

7. I have considered the submissions filed by the Appellants and the 1st Respondent. I have also considered the grounds of appeal. The duty of a first appellate court was stated in the case of *Selle & Another –vs- Associated Motor Boat Company and others* [1963] IEA 123 as follows:

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and arrive at its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally”.

8. The issues which emerge for determination are;
 1. Whether the Appellants' suit was statute barred.
 2. Whether the Appellants proved their case on a balance of probabilities.

Whether the Appellants' suit was statute barred.

9. The Respondent submitted that she had pleaded in her defence that the Appellant's suit was statute barred. She submitted that the alleged purchase of shares from her was in the year 1996 and the suit was filed in X022 which is a period of over 25 years later. It is important to note that the Appellants suit is for recover of land. They allege that the Respondents fraudulently had herself registered as owner of the suit property in X018. Their claim is therefore based on fraud which was discovered in X018. In matters touching on fraud, time does not start running until the fraud is discovered.
10. The evidence of the Appellants in the lower court is that they re-located from Kenya to the USA and South Africa before the shares were transferred to them. They later learned that Malili Ranch Limited had converted the shares into land and that the Respondent had been registered as owner of the suit property in X018. They filed the suit at Kilungu Principal Magistrate's court in X022, four years after discovery of the fraud. The suit was therefore not statute barred.

Whether the Appellants proved their suit on a balance of probabilities

11. In ground (a) and (b) of the memorandum of appeal, the Appellants are accusing the trial magistrate of disregarding the Appellants bundle of documents and the fact that they were in possession of the Respondent's original membership card and share certificate.



12. Contrary to the Appellants' allegations, the trial magistrate succinctly summarised the Appellants' case as follows:

“The Plaintiffs' case is that the 1st Defendant was a shareholder at Malili Ranch Company Limited holding shares 9601, 9602, 9603, 9604 and 9605. That on or around the year 1996 through an oral agreement, the Defendant sold the said shares to the Plaintiffs for a consideration of Kshs.64,000/=. It was a term of the agreement that upon completion of payment, the 1st Defendant would transfer to the Plaintiffs the said shares and she proceed to hand over to the Plaintiffs her membership card number 1029, share certificate number 1029 and card number X029 which are still in the possession of the Plaintiffs to date.

That Malili Ranch Company Limited converted the shares into land being Konza North/Konza North Block 2 (Malili) 1XX5/7/X0 and issued an allotment letter to the 1st Defendant and a title issued to her in the year X018. That the 1st Defendant fraudulently transferred the suit land to her name with the sole intention of illegally taking the Plaintiffs' interest in the suit property. The Plaintiffs allege fraud on the part of the 1st Defendant as set out in paragraph 15 of the plaint”.

13. The trial magistrate also summarised the 1st Respondent's case as follows:

“The 1st Defendant filed defence on 28th July, X021 denying the claim and stated that the Plaintiffs were strangers to her and she had never dealt with them in any way. She denied being the owner of Konza North/Konza North Block 2 (Malili) 1XX5/7/X0. The 1st Defendant urged the court to dismiss the suit with costs”.

14. Having summarised the Appellants' case as well as the 1st Respondent's case, he went on to state the law on oral agreements and the burden of proof. He found that the burden of proof lay on the Appellants to prove their case. He also found that the burden of proof never shifted to the 1st Respondent.
15. In ground (c) (d) and (e) the Appellants seem to argue that the burden of proof was on the 1st Respondent to prove that she was the registered owner of the suit property; that she did not produce her original membership card and share certificate as proof that she was a member of Malili Ranch Limited and that she did not adduce any evidence that she had made any report of loss of her original share certificate and membership card.
16. It is the Appellants who had the burden of proof to discharge that the 1st Respondent was a member of Malili Ranch Limited who held five shares and that she sold the said five shares to the Appellants for Kshs.64,000/= which money was received by the 1st Respondent and finally that the 1st Respondent had the five shares converted into the suit property which was registered in her name.
17. There was no evidence adduced that there was payment of Kshs.64,000/= to the 1st Respondent. The 1st Respondent had denied knowing the Appellants or even being the registered owner of the suit property. There is no evidence which was adduced by the Appellants to show that the 1st Respondent was the registered owner of the suit property.
18. What the Appellant tried to do was to rely on an application for caution which was an application by the 1st Appellant who gave the information on the application including the statutory declaration in support of the application for caution that the 1st Respondent was the registered owner of the suit property. There was no evidence to show that a caution was registered against the title. The Appellants did not produce a search or even a copy of title to prove that the 1st Respondent was the registered



- owner of the suit property. In any case, the Appellants denied giving the 1st Respondent a sum of Kshs.500,000/= as alleged in the application for registration of caution and statutory declaration by the 1st Appellant. Grounds (a) (b) (c) (d) (e) and (f) must therefore fail.
19. In ground (g) and (f), the Appellants are accusing the trial magistrate of disregarding the evidence that the Appellants could not take possession of the suit property as the same had been acquired by Malili Ranch Limited in X018 and distributed in the same year. They also complained that the trial magistrate disregarded the fact that the 1st Respondent took advantage of their absence from the country to acquire title. There is nothing on these two grounds which arose during the hearing. The magistrate would not have been expected to speculate on the motive of the 1st Respondent where there was no evidence to lead to that conclusion. There was no evidence led to show that Malili Ranch Limited acquired the suit property in X018 and had it registered in the 1st Respondent's name in the same year. Equally there was no evidence led to show that Malili Ranch Limited had no land to distribute to its shareholders prior to X018. Grounds (a) (h) and (i) must fail.
20. In grounds (j) and (l), the Appellants are accusing the trial magistrate of disregarding the fact that the 1st Respondent had denied being the registered owner of the suit property and for failing to give directions on the Kshs.64,000/=. The 1st Respondent denied being the registered owner of the suit property. It is the Appellants who were alleging that she was the registered owner of the suit property which was obtained fraudulently. The burden was on the Appellants to prove that the 1st Respondent was the registered owner of the suit property and that the registration was fraudulent.
21. The trial magistrate having found that there was no evidence of payment of Kshs.64,000/= he was under no obligation to make any directions on the same amount. Grounds (j) and (l) must therefore fail.
22. In the case of Vijay Morjaria –vs- Nansingh Madhusing Dabar & Another [X000] EKLR, it 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.....”
23. Though the Appellants had pleaded two particulars of fraud, there was no even an attempt to prove the same. The alleged registration was never proved leave alone the allegation that it was fraudulently done.

Disposition.

24. From the above analysis, it is clear that the Appellants' appeal is devoid of merit. The same is dismissed with costs to the 1st Respondent.

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2025.

