



**Ndiri & another v Omondi (Environment and Land Appeal
E021 of 2022) [2025] KEELC 1088 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

DO OHUNGO, J

MARCH 6, 2025

BETWEEN

RICHARD OUMA NDIRI 1ST APPELLANT

PHILISTA ACHIENG NDIRI 2ND APPELLANT

AND

JAMES OMONDI RESPONDENT

*(Being an appeal from the judgment of the Senior Principal Magistrate's
Court at Butere (Hon. B. Ojoo, Senior Principal Magistrate)
delivered on 26th May 2022 in Butere MCELC No. 98 of 2018)*

JUDGMENT

1. The background of this appeal is that the Appellants moved the Subordinate Court through Plaintiff dated 5th November 2018 wherein they averred that the First Appellant and the Second Appellant were son and widow, respectively, Simon Ndiri Mulesi (deceased) who was the registered proprietor of the parcel of land known as Marama/Shibembe/932 (suit property). That the suit property was ancestral land, and that the deceased sold the property to the Respondent without informing his family and obtaining their consent.
2. The Appellants therefor sought judgment against the Respondent for a declaration that the suit property belongs to the deceased's family and for vacant possession. They also sought costs and interest.
3. The Respondent filed Statement of Defence dated 17th November 2018 in which he averred that the Second Appellant was involved in the sale of the suit property to him. He urged the Subordinate Court to dismiss the Appellants' case with costs.



4. Upon hearing the matter, the Subordinate Court (Hon. B. Ojoo, Senior Principal Magistrate) delivered judgment on 26th May 2022 and dismissed the Appellants' case for want of merit. Each party was ordered to bear own costs of the suit.
5. Dissatisfied with the outcome, the Appellants filed this appeal through Memorandum of Appeal dated 23rd June 2022. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:
 1. The Learned Magistrate erred in law and fact when she disregarded the evidence adduced by the Appellants to prove ownership of the suit land.
 2. The Learned Magistrate erred in law and fact by not appreciating the fact that the appellants had established their case on a balance of probabilities as required by law.
 3. The learned trial magistrate erred in law and fact by not taking into account evidence of crucial witnesses called by the Appellants hence arriving at an unfair judgement.
 4. The learned trial magistrate erred in law and fact by not taking into consideration critical documents tendered in evidence by the appellants and their witnesses which led to grave miscarriage (sic) of justice.
 5. The learned trial magistrate erred in law and fact by not appreciating the fact that the speed at which the Respondent procured title to the suit land was suspect and irregular.
 6. The learned trial magistrate erred in law and fact in not taking into account the fact that the 2nd appellant being the spouse of the owner of the suit land before the ownership changed hands was obliged to execute the sale agreement which she did not.
 7. The trial magistrate failed to appreciate the fact that the defence offered by the Respondent was a sham and ought to have been disregarded, in totality.
 8. That the learned trial magistrate failed to discern from the Appellants case that there was fraud and misrepresentation on the part of the Respondent while acquiring the suit land.
6. Based on those grounds, the Appellants prayed that this appeal be allowed, that the judgment of the Subordinate Court be set aside and be replaced with an order allowing their claim. They also sought costs of both the appeal and of the proceedings in the Subordinate Court.
7. The appeal was canvassed through written submissions. The Appellants filed submissions dated 2nd June 2023 wherein they restated the grounds of appeal and argued that they adduced evidence showing that the suit property was ancestral land. They further contended that if there was a genuine sale of the suit property to the Respondent, the Second Appellant ought to have signed the sale agreement as a witness especially since the Respondent averred that she was involved in the transaction. The Appellants also faulted the Learned Magistrate for holding that they did not hold letters of administration in respect of the deceased. They pointed out that the position adopted by the Subordinate Court on the issue was erroneous since they had included Limited Grant of Letters of Administration Ad Litem in their list and bundle of documents.
8. The Appellants went on to argue that the Learned Magistrate disregarded the testimonies of crucial witnesses such as the Assistant County Commissioner thereby leading to miscarriage of justice. That the speed at which the registration of the suit property in favour of the Respondent had all the hallmarks of fraud and that the Learned Magistrate should have relied on that to uphold their case.



The Appellants also contended that the Respondent's defence was a sham and that he only produced a sale agreement.

9. In reply, the Respondent filed submissions dated 31st June 2024. As to whether the Learned Magistrate disregarded any evidence adduced by the Appellants on ownership and whether the Subordinate Court erred in concluding that the Appellants had not established their case, the Respondent answered in the negative. The Respondent contended that the Land Registrar confirmed in his testimony that the transfer in his favour was regular and procedural. In conclusion, the Respondent argued that the Appellants failed to discharge the burden of proof and urged this Court to dismiss the appeal.
10. This being a first appeal, this court has an obligation to re-consider and re-evaluate the pleadings, the evidence and the entire 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.
11. I have carefully considered the pleadings, the evidence, the grounds of appeal and the submissions. The issue for determination is whether the Appellants were entitled to the reliefs that they sought.
12. As stated in the opening paragraphs of this judgement, the Appellants' case as pleaded was that the suit property was ancestral land, and that the deceased sold the property to the Respondent without informing his family and obtaining their consent. It is on that basis that they sought judgment against the Respondent for a declaration that the suit property belongs to the deceased's family and for vacant possession.
13. Even as they made those allegations against the deceased, it is worth noting that among the documents that the Appellants included in their List of Documents was a Limited Grant of Letters of Administration Ad Litem in respect of the deceased's estate, issued to them jointly on 26th October 2018 and limited to the purpose of filing suit. They are therefore personal representatives of the deceased's estate, yet they are making a serious allegation against the deceased.
14. There is no dispute that the Respondent is the registered proprietor of the suit property. Among the documents that the Appellants produced was a copy of the register in respect of the suit property a perusal of which reveals that the Respondent was registered as the proprietor on 29th January 1990. In his capacity as a registered proprietor, the Respondent is entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of the [Constitution](#) to Section 24 of the [Land Registration Act](#). Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Thus, the only grounds upon which a title can be nullified are 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. Even though they did not claim anywhere in their Complaint that they were suing as personal representatives of the deceased's estate, the Appellants purported to seek a relief for the deceased's estate in the form of a declaration that the suit property belongs to the deceased's family. In my understanding of their Complaint, they sued in their personal capacity and such a relief could not be granted to them since they are not personal representatives of the deceased's estate. See [Rugiri v Kinuthia & 3 others](#) [2024] KECA 1601 (KLR). In any case, as will be manifest below, they did not establish a case for such a relief.
16. Being fully aware that the Respondent is the registered proprietor, the Appellants must have been aware that the only way the Subordinate Court could interfere with the Respondent's proprietorship was if a case to impeach the Respondent's title either through cancellation, nullification or rectification



was pleaded and proven. The Appellants did not seek cancellation, nullification or rectification. If they had sought cancellation, nullification or rectification, they would then have had an opportunity to demonstrate, before the Subordinate Court, if their claim that the deceased sold the property to the Respondent without informing his family and obtaining their consent satisfied the requirements under Section 26 (1) (a) and (b) of the [Land Registration Act](#).

17. It has severally been restated by the Courts that parties are bound by their pleadings. The Court of Appeal stated in [Caltex Oil \(Kenya\) Limited v Rono Limited](#) [2016] eKLR thus:

If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.

18. Having failed to seek cancellation of the Respondent's title despite acknowledging his registered proprietorship, the Appellants' case was doomed to failure from the onset. It is against that background that their submissions in this appeal to the effect that the speed at which the registration of the suit property in favour of the Respondent had all the hallmarks of fraud and that the Learned Magistrate should have relied on that to uphold their case must be seen. Besides failure to seek cancellation, they attempted to ground their case on an allegation of fraud, but again without pleading any fraud in their Pleint.
19. I must remind the Appellants that a litigant who alleges fraud is required to plead it, particularise it, and strictly prove it to a standard higher than 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. The Appellants failed all those requirements.
20. In view of the foregoing discourse, this appeal is bereft of merit. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 6TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Appellants

No appearance for the Respondent

Court Assistant: B Kerubo

