



REPUBLIC OF KENYA



KENYA LAW
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**John v Manthi & another (Environment and Land Appeal
E005 of 2023) [2025] KEELC 2969 (KLR) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 2969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

AY KOROSS, J

APRIL 1, 2025

BETWEEN

MARY MWIKALI JOHN APPELLANT

AND

AGNES NDINDA MANTHI 1ST RESPONDENT

KIMITI HOUSING COOPERATIVE SOCIETY LTD 2ND RESPONDENT

*(Appeal from the judgment of CM Hon. Ole Keiwua K.D., which was
delivered on 30/06/2023 in Kangundo CM ELC Case No. 16 of 2019)*

JUDGMENT

Background of the appeal

1. To contextualize the appeal, the appellant sued her sister, the 1st respondent, before the trial court, over ownership of a parcel of land known as plot no.16 Matuu Canteen Shopping Center (Suit property).
2. Their mother, Lydia Muendi Kilonzo (Lydia), was a member of the 2nd respondent, and their records show she was previously registered as member no. 16, but as an alleged gift inter vivos, Lydia transferred the suit property to the 1st respondent on 14/05/2014.
3. The appellant contended this transfer was fraudulent, and according to her, when Lydia was sick in 2016-2017 and in need of medical treatment, she purchased the suit property from other family members for ksh. 750,000/- of which she paid ksh. 700,000/- leaving a balance of ksh. 50,000/-. According to her, this money was also expended towards Lydia's medical treatment and funeral expenses.
4. In her plaint dated 21/05/2018, she particularized fraud against the respondents in the following manner: -



- a. Taking advantage of Lydia's old age and obtaining her thumbprint without her knowledge to show she transferred the suit property to the 1st respondent while she had not.
 - b. Altering the 2nd respondent's records without valid reason or cause to accommodate the 1st respondent's name as the suit property's owner.
 - c. Falsely presenting the 1st respondent as the suit property's owner while knowing this was untrue.
 - d. The 2nd respondent's secretary is married to the appellant and the 1st respondent's sister, and he manipulated the 2nd respondent's records to rob Lydia's estate.
5. Consequently, the following reliefs were sought by the appellant: -
- a. A declaration the registration of the 1st respondent as the suit property's owner is fraudulent and the 2nd respondent be directed to delete the said registration and restore it in Lydia's name.
 - b. By permanent injunction, the 1st respondent be restrained from interfering in any manner with the appellant's quiet possession of the suit property until appropriate orders are made over Lydia's estate.
 - c. Costs of the suit to the plaintiff.
6. In defence of the plaint, the 1st respondent filed a defence dated 11/06/2018, whereby she stated the suit property was gifted to her by Lydia and subsequently transferred to her, therefore, it was not available for sale to the plaintiff by family members.
7. Furthermore, she asserted that, in any case, these family members did not have the legal capacity to transact over the suit property, and the alleged agreement was null and void.
8. She also denied the allegations of fraud and stated she had been in occupation of the suit property from 1996 upto 2015.
9. As for the 2nd respondent, their defence dated 6/06/2019 was composed of denials, and it put the appellant to strict proof. Both respondents urged the court to dismiss the appellant's suit with costs.
10. The matter proceeded to a hearing, and the appellant testified as PW1 and produced documents respectively marked as Pex.2-7. Her evidence was led by Lydia's grandchildren, Nicholas Mulwa Mutua (PW2) and Peter Munyua Kunulu (PW3).
11. Jointly, the respondents' testimonies were composed of that of the 1st respondent, Aaron Munyao (2nd respondent's treasurer) and Boniface Mulei Muoki (2nd respondent's secretary), and they all respectively testified as DW1- DW3.
12. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed 2 issues for determination, which were whether the suit property was gifted to the 1st respondent and whether the appellant purchased the suit property.
13. In his findings, the learned trial magistrate affirmed the 1st issue and found the 2nd issue in the negative.

Appeal to this court

14. Dissatisfied by the impugned judgment, the appellant filed her memorandum of appeal dated 20/01/2023, which faulted the learned trial magistrate on several grounds.



15. But, being aware of the shortcomings of the grounds as they were not concise and raised matters of evidence, in submissions dated 16/01/2025 filed by his law firm on record M/s. Calistus & Co. Advocates, her counsel collapsed them into 2 grounds of appeal, which were whether the learned trial magistrate erred in law and fact in dismissing the appellant's suit and who should bear the costs of this appeal.
16. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment and have it re-assessed, and sought the costs of the appeal and the lower court suit.

Submissions.

17. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions were highlighted earlier herein, and her counsel argued the appeal on the summarised grounds.
18. The 1st respondent, who was represented by the law firm of Ms. Munguti Ngulukyo & Co. Advocates, filed written submissions dated 14/02/2025, and they adopted the summarized grounds of appeal as the issues arising for determination. Noteworthy, the 2nd respondent did participate in these proceedings.
19. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the rival arguments contained in the submissions on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Issues for determination

20. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Further, the court shall also be steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 that has been relied upon by the 1st respondent counsel.
21. The summarized principles of this decision are that this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself and thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
22. Turning to the matter at hand, this court has carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited, and the issue for resolution is the condensed grounds of appeal which shall be handled together.

Analysis and Determination

23. The appellant's claim before the trial court was on fraud, and the crux of the issue for determination is whether this claim was proved to the required standards.
24. The legal framework on the legitimacy of title documents is governed by Sections 24 and 25 of the [*Land Registration ACT*](#). Even so, a title document can be challenged on grounds set out in Section 26 of this Act.
25. Section 24 recognizes the registered owner as the absolute owner of the land, and this proviso of the law provides as follows: -

“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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’

26. While Section 26 of the [Land Registration Act](#) states as follows;

“26(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.”

27. By these statutory provisions, courts consider title documents as prima facie evidence of ownership of land. This proprietorship allows the registered owner to enjoy rights of possession, occupation, and quiet use of her land. Still, the registered owner’s proprietorship can only be challenged on the grounds set out in Section 26.

28. In the circumstances of this case, the suit property is not registered and it appears it is part of a larger land that is registered in the name of the 2nd respondent whose members hold shares of a portion of this larger land whose particulars were not disclosed.

29. In her claim, the appellant pleaded and particularized fraud against the respondents, and it is paramount to appreciate the meaning of fraud. Black’s Law Dictionary, 11th Edn, pg 802 defines fraud in the following words: -

- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when conduct is willful) it maybe a crime.)- Also termed intentional fraud...
- 2. A reckless misrepresentation made without justified belief in its truth to induce another to act.
- 3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment. Additional elements in a claim of fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.



4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.”
30. When one pleads fraud, Order 2 Rule 10 (1)(a) of the Civil Procedure Rules (CPR) provides that such claims have to be particularised, and this proviso states: -
- “ (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and”
31. It is settled law that fraud must procedurally be specifically pleaded and proved on parameters beyond a balance of probability but below that of beyond reasonable doubt.
32. This principle of law was well elucidated in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar* (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) (1 December 2000) (Judgment), which has been relied on by the 1st respondent. In this decision, the Court of Appeal held: -
- “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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis added
33. Further, it is settled law that she who alleges must prove and on evidentiary burdens, courts are usually guided by Sections 107-109 of the *Evidence Act*.
34. An analysis of the impugned judgment reveals that the learned trial magistrate did not apply the principles of fraud to the subject suit. Therefore, as a 1st appellate court, this court is called upon to re-assess the evidence and arrive at its own independent decision.
35. It is also unfortunate the appellant has not addressed the issue of fraud in her arguments, and it is only the 1st respondent's counsel who has argued before this court that fraud was not proved by the appellant to the required standards.
36. On considering the appellant's pleadings and juxtaposing the evidence on record against these principles, this court agrees with the 1st respondent's counsel that they were not proved to the required standards.
37. This court arrives at this conclusion for several reasons; even if the appellant contended Lydia was old and impaired, thus unable to gift the suit property to the 1st respondent, no medical evidence was displayed to demonstrate this.
38. Moreover, her allegations that the 2nd respondent's records were fraudulently altered by transferring the suit property to the 1st respondent were dissipated by the respondents' witnesses who discharged the evidential burden when they rebutted the appellant's allegations by demonstrating due process was followed towards transfer of the suit property to the 1st respondent.



39. They did this by producing a gifting agreement executed by Lydia and 1st respondent dated 30/08/2012, payment of transfer fees and a certificate of registration no.C003049 issued by the 2nd respondent to the 1st respondent. There was no evidence whatsoever that the thumbprint in the gifting agreement was not Lydia's.
40. In other words, the root of the 1st respondent's title was displayed, and this court agrees with the finding of the learned trial magistrate that the suit property was duly gifted to the 2nd respondent by Lydia- it was a gift inter vivos.
41. Although the appellant has invited this court to assess whether this largesse met the threshold of a gift inter vivos, this court declines to entertain such bidding as this is a new issue being raised on appeal.
42. Additionally, as to the question of whether the appellant purchased the suit property, the Court of Appeal in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR held that it was a firmly established rule of pleadings that a judgment and remedies therein must flow from pleadings.
43. An examination of the plaint shows no relief was ever sought in respect of the appellant's alleged purchase from other family members, and in my humble view, this was never an issue for determination.
44. In any case, the said agreement was unsustainable as the 1st respondent, who was the registered owner, did not participate therein.
45. Furthermore, it emerges from the reliefs that she was pursuing the claim on behalf of Lydia's estate, and she prayed for the suit property to be reverted to Lydia. That being so, and as rightfully pointed out by the respondent, she lacked locus standi to institute the suit.
46. Consequently, for the reasons and findings stated herein above, this court finds the appeal is not merited, and it is hereby dismissed. It is trite law costs follow the event, but because of the special circumstances of this appeal whereby the appellant and 1st respondent are siblings, each party shall bear their respective costs of the appeal. As the 2nd respondent did not participate in these proceedings, no orders as to costs are made in its favour.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 1ST DAY OF APRIL, 2025.

HON. A. Y. KOROSS

JUDGE

01.04.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Miss Kerima holding brief for Mr Odhiambo for appellant.

Mr. Munguti for 1st respondent.

N/A for 2nd respondent.

Ms Kanja- Court Assistant

