



**Kanda & another v Kiprotich (Environment and Land Appeal
E008 of 2023) [2024] KEELC 14192 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 14192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

L WAITHAKA, J

MAY 7, 2024

BETWEEN

WILFRED KIBET KANDA 1ST APPELLANT

NAHASHON KIPLIMO KANDA 2ND APPELLANT

AND

BENJAMIN KIPROTICH RESPONDENT

*(Being an appeal from the judgment of Hon. C. A. Kutwa
SPM delivered on 3rd May 2023 in ELC Case No. 20 of 2018)*

JUDGMENT

1. By a plaint dated 19th January 2018 and amended on 27th August 2019, the plaintiff (now respondent) instituted a suit in the lower court to wit Iten SPMC ELC Case No.20 of 2018 seeking judgment against the defendants (now appellants) for an order of permanent injunction to restrain the defendants by themselves, their servants and/or agents from interfering with the parcel of land known as title No. Elgeyo Mara-kwet/Kapsowar/841, measuring 0.8 hectares (herein-after referred to as the suit property). The plaintiff also sought a declaration that the suit property rightfully belongs to him.
2. The suit was premised on the grounds that at all times material to the suit, the suit property was registered in the name of the plaintiff's father, Chelimo Kipkatam Chepkwony (deceased); that the defendants had encroached on the suit property and that the plaintiff's attempts to get the defendants to stop interfering with the suit property were futile.
3. The defendants filed a joint statement of defence and counterclaim, dated 27th February 2018, denying the allegations levelled against them and contending that the suit property was registered in the name of Johana Kipkatam Chelimo fraudulently and without following the correct legal procedure.



4. The particulars of fraud were given as follows:-registration was done without their consent; suit property was erroneously registered in the name of the plaintiff's father and that the plaintiff concealed crucial information at the lands office in order to defeat justice.
5. The defendants further pleaded that they had been in use and possession of the suit property since 1941; that their use of the suit property had been exclusive and uninterrupted and that they had carried out extensive developments in the suit property (had been cultivating the suit property for over 15 years and had erected permanent structures therein).
6. Terming the plaintiff's suit scandalous, frivolous, vexatious and an abuse of the process of the court, by way of counterclaim, the defendants sought judgment against the plaintiff for a permanent injunction to restrain the plaintiff from claiming, trespassing and in any other way interfering with the suit property. The defendants also sought an order for cancellation of the registration of the suit property in the name of the plaintiff's father.
7. When the case came up for hearing, parties gave evidence in support of their pleaded case and filed submissions at close of hearing.
8. Upon considering the cases urged by the parties, the learned trial magistrate entered judgment in favour of the plaintiff and dismissed the defendants' defence and counterclaim. In so doing, the learned trial magistrate inter alia stated:-

“I have considered the evidence on record and the submissions filed by the parties. The issues for determination are:-

- a. Whether the plaintiff's late father is the registered owner of the suit land;
- b. Whether the plaintiff's late father obtained the suit land fraudulently;
- c. Whether the plaintiff is entitled to the orders sought.”

9. On whether the plaintiff's late father is the registered owner of the suit property, the learned trial magistrate stated:-

“It is not in dispute that the plaintiff is the registered owner of the suit property. The same was registered in the plaintiff's name on 21st April 2010. The plaintiff in his evidence stated that he acquired the suit land from his late father. The defendants have questioned the process that led to the acquisition of the title by the plaintiff's late father. It was their evidence that the process was marred by fraud.

The plaintiff's claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. He has produced documentary evidence in the form of a title deed over the suit land in his late father's name as proof of ownership.....

The courts are mandated by statute to consider a title document as prima facie evidence of ownership and conclusive evidence of ownership to land which can only be challenged on grounds stipulated as above.....

In order to challenge the plaintiff's title so as to have it cancelled by amending the register as prayed by the defendants. According to section 26 of the Act (*Land Registration Act, 2012*) evidence ought to have been led to prove that the plaintiff's title had been acquired fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme....



In the instant case, although the defendant's case was based on allegations that the plaintiff's late father had transferred the suit land without their consent they have not strictly speaking challenged the authenticity of the title held by the plaintiff. The search that was produced in court shows that the land was transferred to the plaintiff on 21st April 2010 when his late father was alive. If all the defendants inherited the land, it was their duty to follow up the matter with the plaintiff's father and/or his estate...

I have examined the defendants' defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore still born and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that they inherited the land from their grandfather is well below the standard of proof set under the authorities cited. I need not belabour this issue as I am satisfied that it was neither properly pleaded nor strictly proved.

The plaintiff has proved on a balance of probabilities that he is the owner of the suit land. He has also proved that the defendants are trespassers in the suit land. In the premises, I allow the plaintiff's claim in terms of a permanent injunction and declaration that the suit land belongs to the plaintiff. I also dismiss the defendants' counterclaim with costs to the plaintiff."

10. Aggrieved by the decision of the lower court, the defendants appealed to this court on the grounds that the learned trial magistrate erred by:-
 1. Misapprehending the law applicable to the case;
 2. Determining that the plaintiff is the owner of the suit property when there was no evidence or legal basis for doing so;
 3. Holding that the defendants had not provided particulars of fraud/illegality when the same were given and sufficient evidence adduced in respect thereof;
 4. Failing to critically analyze the evidence on record, the pleadings and the defendants' submissions thereby arriving at a wrong conclusion.
11. In essence, it is the appellants' case that the learned trial magistrate erred by allowing the plaintiff's case and dismissing their defence and counterclaim.
12. Pursuant to directions given on 23rd January 2024, that the appeal will be disposed by way of written submissions, parties filed submissions, which I have read and considered.

Submissions

Appellants Submissions

13. In their submissions filed on 6th February 2024, the appellants have given an elaborate overview of the cases urged by the parties in the lower court and framed the issues for the court's determination as follows;
 - i. Whether the learned magistrate erred in law and in fact in making his decision based on misapprehension of the law;
 - ii. Whether the learned magistrate erred in law and in fact by finding that the respondent is the owner of the Land Parcel Number Elgeyo Marakwet/Kapsowar/841 without any evidence or legal basis whatsoever;



- iii. Whether the learned trial magistrate erred in law and in fact that the appellants neither pleaded particulars of fraud and/or illegality or adduced sufficient evidence to that effect when in essence the same was particularly pleaded and sufficient evidence adduced by the appellants;
 - iv. Whether the Learned Magistrate erred in law and in fact by failing to critically analyze the evidence on record, the pleadings and the appellant's written submissions together with cited authorities annexed therein arriving at a wrong conclusion.
14. The appellants have submitted that despite the respondent being in possession of a title deed to the suit property, he needed to prove that he had a good title as its validity had been challenged. Based on the decisions of *Daudi Kiptugen v Commissioner of Lands & 4 others* (2015) eKLR, *Micheal Chelimo Kipkiru v Julius Kiprop Kipkirui* (2018) eKLR, *Alice Wairimu Macharia v Kirigo Philip Macharia* (2019) eKLR, *Isaac M'inanga Kiebia v Isaaya Theuri M'lintari & another* (2018) eKLR *Munyu Maina v Hiram Gathiha Maina*(2013) eKLR, Civil Appeal 239 of 2009, the appellants have reiterated that the evidence they adduced was proof that the suit property was ancestral land and therefore a constructive trust existed which the learned trial magistrate failed to consider together with the pleaded particulars of fraud.

Respondent's Submissions

15. The respondent also gave an overview of the parties pleaded cases and framed the following issues for the court's determination;
 - a. Whether the respondent obtained title to the suit property fraudulently as the defendant alleges;
 - b. Whether the appellants are in lawful occupation of the suit property and/or whether the appellants have an overriding interest over the land;
 - c. Whether the respondents is entitled to the reliefs sought and who is to bear costs of this suit.
16. Based on the decisions of *Vijav Morjaria v Nasingh Madhusingh Darbar & another* (2000) Eklr, *Giella v Cassman Brown & Company Limited* 1973. E.A 358, *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* (2020) eklr, *Republic v Rosemary Wairimu Munene Ex-Parte Applicant v Ihururu Dairy Framers Co-operative Society Ltd* Judicial Review Application 6 of 2014, the respondent has reiterated that he proved his case in the lower court on a balance of probabilities that he is the rightful owner of the suit property having met the provisions of Section 24 and 26 of the Land Registration Act, 2012.

Analysis and determination

17. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
18. In paragraph 1 and 2 of this judgment, the respondent instituted this suit seeking a declaration that the suit property belongs to him and a permanent injunction to restrain the defendants from interfering with the suit property.



19. In paragraph 3 of this judgment, the defendants/appellants acknowledged that the suit property is registered in the name of the plaintiff's father but contended that registration of the suit property in the name of the plaintiff's father was effected by fraud.
20. There being evidence that the suit property is registered in the name of the plaintiff's father (Registration of the suit property in the name of the plaintiff's father was effected on 21st April 2010), by dint of the provisions of Section 26(1) of the Land Registration Act 2012, the plaintiff's father having been registered as the proprietor of the suit property is prima facie the absolute and indefeasible owner of the suit property. As rightly observed by the trial court, registration of the plaintiff's father can only be challenged on the grounds specified under Section 26(1)(a) and (b) of the Land Registration Act, 2012. These are:-
- “(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.”
21. Section 26(1)(a) and (b) captures the letter and spirit of Article 40(6) of the Constitution which does not offer legal protection to unlawfully acquired property. Article 40(6) provides as follows:-
- “The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”
22. In the circumstances of this case, where there is evidence that the suit property is registered in the plaintiff/respondent's father, it behooved the defendants/appellants to not only sufficiently plead fraud in the registration of the plaintiff's father as the proprietor of the suit property but also to lead evidence capable of proving the particulars of fraud urged against the plaintiff. In that regard, see the case of *Vijay Morjaria vs. Nansingh, Madhusingh Darbar & Another* (2000) e KLR where it was held:-
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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 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. It is trite law that the standard of proof for claims based on fraud is higher than in the ordinary civil cases. In that regard, see the case of *Koinange & 13 Others vs. Charles Karuga Koinange* (1986)KLR at page 23 where it was held:-
- “When fraud is alleged by the plaintiffs the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
24. In the circumstances of this case, the defendants merely pleaded that the registration of the suit property was effected without their consent; that the correct legal procedures for registration of the suit property were not followed and that the plaintiff concealed material facts from the land registrar in order to defeat justice. The defendants did not state what legal procedures were not complied with; what material facts were concealed and/or that their consent was required before the suit property



could be registered in the name of the plaintiff's deceased father. For that reason, I agree with the learned trial magistrate that the defendants' did not adequately plead fraud and or want of procedure in the registration of the suit property in the name of the plaintiff's father.

25. The evidence adduced was also incapable of proving the pleaded fraud/want of compliance with law to the required standard. The defendants merely based their claim on history of occupation and use of the suit property, which per se is not proof that the registration of the suit property was effected by fraud.
26. The upshot of the foregoing is that the appeal has no merits. Consequently, I dismiss it with costs to the plaintiff/respondent.
27. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT ITEN THIS 7TH DAY OF MAY, 2024.

L. N. WAITHAKA

JUDGE

Judgement delivered virtually in the presence of:-

Mr. Oswere Otieno for the appellant

Mr. Barmao for the respondents

Court Assistant – Jael Kerubo

