



REPUBLIC OF KENYA



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Muiyuro & 2 others v Muthathai & 4 others (Environment and Land Appeal E009 of 2023) [2024] KEELC 4469 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

A KANIARU, J

MAY 8, 2024

BETWEEN

AGNES WEGOKI MUIYURO 1ST APPELLANT

NTURAKU MURIUKI 2ND APPELLANT

BILIAH GATAVI MBUKU 3RD APPELLANT

AND

NTHAKANIO MUTHATHAI 1ST RESPONDENT

VIRGINIA IGANDU NTHAKANIO 2ND RESPONDENT

JAMES KARIUKI NTHAKANIO 3RD RESPONDENT

ESTHER WANJA NTHAKANIO 4TH RESPONDENT

LUCY WAWIRA NTHAKANIO 5TH RESPONDENT

*(Being an appeal from the judgement of Honourable J.W GICHIMU
SPM dated 29.06.2023 in Runyenjes in MCL&E Case No. 80 of 2017
Agnes Wegoki Muiyuro & 2 others v Nthakanio Muthathia & 4 Others)*

JUDGMENT

1. The Appellants – Agnes Wegoki & 2 others - had instituted a suit in the lower court against the Respondents – Nthakanio Muthathia & 4 others - by way of a plaint filed on 09.11.2017. Their case was that the 1st Respondent who is now deceased was their father who had in his lifetime two wives, one being their deceased mother and other being the 2nd Respondent. That the 3rd, 4th and 5th respondents were their step siblings. That their father was the owner of original land parcel Kagaari/Weru/2xx, which measured 2.02 Ha.



2. They complained that the 2nd to 5th respondents had fraudulently caused their father to subdivide land parcel 2xx into two parcels of land, being Kagaari/Weru/8xxx & 8xxx, and transferred parcel 8xxx to them (the respondents) and 8xxx to Njeru Nthiakano, who is the appellant's brother, when he lacked the mental capacity to do so at the time of transfer. That before he effected the transfers, the 1st respondent had initiated a process to give the appellants a portion of the suit property which had already been earmarked and surveyed and boundaries fixed on the ground. They were asking the court to cancel the joint title registered in favour of the 2nd - 5th respondents and that the same be reverted to the 1st respondent. They also ask for costs of the suit and any other relief that the court may deem fit to grant.
3. The respondents had filed a defence where they denied the appellants allegations and said that the 1st respondent had willingly and voluntarily transferred the said parcels of land to the respective parties.
4. During hearing in the lower court, the 1st appellant testified as PW1 and adopted her witness statement as evidence. She also produced her list of documents as evidence which included; a copy of the green card for title no. Kagaari/Weru/8xxx and a copy of a receipt of survey fees for land parcel 8xxx from Newden Land Agencies. She testified that the 1st respondent during his lifetime had in 2014 subdivided his original land Kagaari/Weru/2xx equally into two portions, being parcel 8xxx & 8xxx. That parcel 8xxx was given to her brother, Njeru Nthakanio, and the other half (8xxx) was transferred to his 2nd wife and her children. That the brother Njeru was given the land because he paid a loan for the 1st respondent though she did not have the documents to prove the same.
5. She testified further that parcel 8xxx was shared to them but her stepmother had the whole parcel of land registered to herself and that she came to know it when she went to the lands office. That the respondents took advantage of her father's mental incapacity to transfer the land to themselves though she did not have the medical records to show the mental incapacity. It was her case that she was entitled to a share of parcel no. 8xxx.
6. PW2 was Grison Mbogo Njeru who testified that he was the grandson of the 1st respondent and the son of Njeru Nthakanio. It was his testimony that when his father was given land parcel 8xxx, the 1st respondent was not sick.
7. PW3 was Njeru Nthakanio who testified that the appellants are all his sisters whereas the other respondents were his step brothers and sisters. That the 1st respondent took a loan from AFC and used parcel 2xx as security but he was unable to pay the loan. That he gave him a portion of one acre of the land and he agreed to pay the loan on his behalf which he paid from the year 1976 to 1977. That after he paid the loan, his father subdivided the land and gave him one acre. He testified further that he did not have any documents to prove that he paid the loan to AFC neither did he have in evidence an agreement between him and the deceased 1st respondent on that arrangement. That the deceased went before the land control board to subdivide the suit land in 2014. That it is not true that he was given parcel no. 8xxx to hold in trust for his siblings though he was the only son of his mother.
8. That further, in 2017 the 1st respondent transferred parcel no. 8xxx to the other respondents fraudulently as the same should have been shared with the appellants. It was his position that he could not share his parcel of land with his sisters as he had bought he same. That it is the 2nd respondent and her children who are living on parcel 8xxx and not the appellants. He produced in evidence a copy of an application form for registration of a Discharge dated 21.02.2014 and a copy of stamp duty declaration form from KRA dated 21.02.2014.



9. DW1 on the other hand was the 4th Respondent, Esther Wanja Nthakanio. She testified that parcel 8xxx was given to Njeru Nthakanio by their father to hold in trust for his siblings as their mother had died. That the other parcel 8xxx was registered in the names of his father who in 2017 gave the same to his mother and his siblings and title deeds were issued. She denied that the appellants are entitled to the land or that they took advantage of their father's illness to have the suit land transferred to them. That they attended the land control board at Runyenjes though she did not have the application from the land board in court. That their father is buried on land parcel 8xxx. She produced in evidence a copy of the green card for land parcels 2xx, 8xxx & 8xxx.
10. DW2 was Nthiga Mudu Wameru who testified that he was a neighbor to the 1st respondent. That the 1st respondent called him as a village elder in 2014 and told him that he wanted to share his land because he had two wives. He said also that he was present when the land was surveyed. That the deceased gave the portion belonging to his first wife to his first born son, Njeru, to share with his sisters and the other portion he gave to the 2nd wife and her children. That Njeru lives on the portion which was given to him together with his sisters, who are the appellants, but they got married and left the place leaving Njeru and his family. That the other portion of land is occupied by the 2nd wife and her children. That it is not true that the deceased was very sick and did not know what he was doing.
11. The lower court at Runyenjes heard the case and in a judgement delivered on 20.06.2023 found as follows;
 - a. That at the time the 1st respondent subdivided his land, the 1st wife was deceased which therefore makes sense that PW3 who was the only son of the 1st respondent with his 1st wife was registered as the owner of parcel 8xxx. That PW3 was registered as the owner of parcel 8xxx to hold for himself and his sisters, who are the appellants. The court rejected the argument that PW3 bought the land from the 1st respondent by repaying a loan owed to AFC by the 1st respondent because he did not tender any evidence to prove that the original land was charged to AFC by the 1st respondent or prove that he had paid any money to AFC in form of a loan.
 - b. That the appellants had failed to prove that the respondents used fraud to have the 1st respondent transfer parcel no. 8xxx to them. That no evidence was tendered to prove that the 1st respondent did not possess the requisite mental capacity to transfer the land to the respondents voluntarily.
 - c. That the 1st defendant intended that parcel no. 8xxx be given to his 2nd wife, that is the 2nd respondent and her children. The court was persuaded that the evidence of DW2 on the same was clear.
 - d. That the appellants did not have any claim over parcel 8xxx and that the same belongs to the respondents. That the appellants claim, if any, lies in parcel 8xxx.
 - e. The court found that the appellants had failed to prove their case against the respondents on a balance of probabilities and dismissed the same with costs to the respondents.
12. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with six (6) grounds as follows:
 1. The learned magistrate erred in law and fact by dismissing the suit filed by the plaintiff's against the defendants.



2. The magistrate erred in law and fact when he failed to consider the evidence and documents by the plaintiff's and the defendant before making his final judgement.
 3. The learned magistrate erred in law and fact by relying heavily on the evidence produced by the defendant.
 4. The learned magistrate erred in law and fact that as the land in question is a family matter which needed a lot of consideration.
 5. The learned magistrate erred in law and fact in giving unnecessary weight to the defendant's evidence.
 6. That the judgement was against the weight of evidence adduced.
The court was urged to set aside the judgment in MCL & E No. 80 of 2017 Runyenjes and/or vary the same and for the costs of the appeal to be provided for.
13. It was agreed that the appeal be disposed of by way of submissions. The appellant's submissions were filed on 12.02.2024 while the respondent's submissions were filed on 05.01.2024.
 14. The appellant gave a history of the case and submitted that the trial court at Runyenjes failed to consider evidence produced by PW3 who paid a loan to the bank and discharged the title deed of the original suit land. That the court did not consider that the appellants being the beneficiaries of the deceased, are entitled to their portion of land. That if their appeal is not allowed, they will be left without land and their inheritance as was given by their father will go to the respondents. That their appeal is based on the fact that the trial court's judgement solely relied on the evidence which was produced by the respondents and failed to consider their evidence. That the said judgment be set aside and the title deed, which allegedly was issued illegally, be cancelled and that they be given ½ an acre which they are fighting for. They urge that the appeal be allowed.
 15. The 2nd, 3rd, 4th and 5th Respondents on their part also gave a history of the case. They submitted that the trial court carefully analyzed the evidence that was adduced before it and that the appellants did not prove their case on a balance of probabilities. That the trial court did not favour the respondents and that the appellant's case was dismissed on merit. That the appellants' grounds of appeal are general and do not specifically point out how the trial court erred in arriving at its judgement. They urge that the appeal be dismissed for lack of merit with costs to the respondents.
 16. I have considered the grounds of appeal filed, the record of appeal, as well as the submissions of the parties and their arguments. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
 17. From the material before me, I find that the issues for determination are;
 - a. Whether the deceased Nthakanio Muthathai had the mental capacity to transfer land parcel no. Kagaari/Weru/8xxx to the 2nd to 5th Respondents.
 - b. Whether there was fraud in the transfer of the said land to the 2nd – 5th Respondents.



c. Whether the appellants are entitled to land parcel 8xxx.

18. On the first issue for determination, the appellant's main complaint is that the respondents caused their deceased father to transfer his land to them to their exclusion when they are also entitled to part of it as his beneficiaries. They say that the circumstances in which that was done were fraudulent as their father at the time was ill and did not have the mental capacity to know what he was doing. The trial court found that the appellants did not adduce any evidence to prove either mental incapacity on the part of the 1st respondent to transfer the suit land or any act of fraud on the part of the 2nd – 5th respondents which this court must agree with. This is because, one, in a case such as this where the appellants accused the 1st respondent of lacking the mental capacity to transfer land at the time of doing so, it is already settled that the burden of proof lay squarely on the appellants to prove not only the said incapacity but also that the parties in favour of whom the suit land was transferred knew of the said incapacity.
19. See the case of *Wiltshire Vs. Cain* [1958–60] 2 Barb. L. R149, as cited in [*Patel & another v MJC & another \(Suing as the guardians of PJP\) \(Civil Appeal 182 of 2019\)*](#) [2022] KECA 364 (KLR) (4 February 2022) (Judgment) where the court held that:
- QUOTE{startQuote “}****
- for the defence to succeed it must show (a) the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see *Imperial Loan Co. v. Stone* Lord Eastern [1892] 1 QB 599. The fact that the plaintiff had knowledge of the defendant's condition must be brought home to entitle the defendant to succeed. In that case Lord Justice Lopes stated that: “a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed.”
20. In the same case, *Patel & Another (supra)*, the case of *Grace Wanjiru Munyinyi & Another Vs. Gedion Waweru Githunguri & 5 Others*[2011] eKLR was cited where the court observed as follows:

“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the *Wiltshire Case* (supra), that the burden of proof lies on the person who asserts the incapacity. In the *Wiltshire Case*, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for forty years, and testified that he examined the defendant three months after the sale agreement and “found symptoms of senile degeneration in that he was delusional, confused, and incoherent” and in his opinion the defendant was “incapable of managing his own affairs by reason of mental infirmity”. A neighbour of the defendant was also called to testify that she saw him “doing stupid things”, while the defendant's married daughter also testified that “he stayed away from home one full day,” “talked and walked about and loosed other peoples animals” and “tore up dollar bills”. All that evidence was rejected by the court as insufficient to avoid the transaction. The Supreme Court stated: “A person may be or become of sound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this



incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”

The court proceeded to hold that:

“...it was not sufficient to establish the mental incapacity of Mbogo or the knowledge of such incapacity by the appellants when the power of- attorney was executed. Both required proof but there was none. The presumption is therefore that Mbogo was in control of his faculties when he appeared before an Advocate & Commissioner for oaths, one Githiru N.M. on 22nd February, 2002 and executed the Power of Attorney”.

21. In this case, the appellants merely accused the 1st respondent of lacking the mental capacity to transfer his land to the respondents. They did not produce any evidence to support that allegation. The requirement is that mental incapacity must be proved and that can only be done with evidence and not mere statements as is the case herein.
22. Again, it was the appellant’s case that the said transfer of the suit land to the 2nd -5th respondents was based on their fraudulent actions. In their pleadings, they gave the particulars of fraud. However, that was also not enough as they also had the burden of proving the said fraud during hearing. It is settled law that for a claim of fraud to succeed, the same must be proved to a standard higher than that of a balance of probabilities but lower than beyond reasonable doubt. The appellants did not tender any evidence to prove their allegations and in the absence of such evidence, the 2nd – 5th respondents cannot be said to have fraudulently caused the suit land to be transferred to them.
23. For all this, see the Court of Appeal case of Ardhi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR as cited in Hebron Orucho Gisebe & 2 others v Joseph Ombura Gisebe & another [2022] eKLR where in considering the issue of fraud the court observed as follows: -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427: “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Case. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

24. On the third issue, the 1st respondent being the lawfully registered owner of the suit land, and this court having found that he had the mental capacity to transact, he then was within his rights under Section 25 of the [Land Registration Act](#) to deal with the land as he saw fit. The subdivision of original land parcel 2xx and the subsequent transfer of parcel 8xxx to the 2nd - 5th respondents and parcel 8xxx to PW3 was therefore within his rights. The appellants did not produce any evidence to prove that it was the intention of the deceased for them to acquire a portion of land parcel 8xxx, neither was there



any evidence from the respondents to show that the deceased intended that land parcel 8xxx be held in trust by PW3 for his siblings, who are the appellants.

25. In fact, what kept coming out clearly was that the said land was given to PW3 as compensation for assisting the 1st respondent to clear a loan with the bank that he had secured with the original parcel of land, which loan he had been unable to pay. I do not agree with the trial court that PW3 did not produce evidence to show that he had that kind of arrangement with the 1st respondent. This is because, he produced in evidence a copy of an application for registration of a discharge as well as a stamp duty declaration assessment slip over the said land parcel 2xx which can be said to be evidence that it was he, PW3, who discharged the said parcel of land and therefore his claims that he was given the land as compensation for the same on a balance of probability can be said to be true.
26. For the foregoing reasons however, this court agrees with the trial court that the appellants did not prove their case against the respondents to the extent that they are entitled to have title to land parcel 8xxx issued to them or that the same should be cancelled and revert back to the 1st respondent. They did not prove the issue of fraud or lack of mental capacity to the required standard and therefore this court finds no reason to interfere with the trial courts judgement. This therefore means that the appeal is dismissed.
27. Given that the parties are members of the same family, this court will not make any orders as to costs and directs that each party bears their own costs of the appeal.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **8th day of May, 2024.**

In the presence of Appellants and Ithiga Githinji for respondents.

Court Assistant - Leadys

A. KANIARU

JUDGE-ELC, EMBU

08/05/2024

3

