



**Kirigia v Kinyua (Environment and Land Appeal E072 of 2022)
[2024] KEELC 6470 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E072 OF 2022**

CK YANO, J

OCTOBER 3, 2024

BETWEEN

MICHAEL KILEMI KIRIGIA APPELLANT

AND

STEPHEN MURIMI KINYUA RESPONDENT

JUDGMENT

1. The appellant vide a plaint dated 1st December, 2020 filed Tigania PMC ELC Suit No. E042 of 2020 against the respondent herein seeking an order of permanent injunction restraining the respondent either by himself, his family members, friends, relatives, assigns and or anybody else acting on his behest from further building, cultivating, trespassing or entering into the appellant's land LR No. Nyambene/Uringu 1/4621 and in default eviction orders to issue, costs of the suit and interest and any other relief the court may have deemed fit or just to grant.
2. The appellant averred that on 31st October, 2011 he entered into a written agreement with the respondent for purchase of a portion measuring 0.10 acres out of LR No. 4621 Uringu 1 Adjudication Section from the respondent at a consideration of Kshs. 25,000/- which he stated he paid in full, but the respondent refused to honour the terms and conditions of the contract by failing to give vacant possession of the said land which is already registered in the appellant's name, and title deed issued to him on 12th January, 2014.
3. In his amended defence dated 19th January, 2022, the respondent denied that the land was registered in the name of the appellant since he had never signed a transfer to that effect. He raised a counterclaim in which he sought to refund the consideration amount and to be allowed to pay the liquidated damages as per the agreement. The respondent also pleaded that the court lacked jurisdiction to hear the matter and that the appellant had no consent to file the suit.



4. Upon considering the matter, the learned trial magistrate, Honourable P. Wechuli (SRM) in a judgment delivered on 3rd November, 2022 dismissed the appellant's claim and allowed the respondent's counterclaim in terms of paragraph 12 of the counterclaim. Costs of the suit were awarded to the appellant.
5. Being aggrieved by the said decision, the appellant filed this appeal on the following grounds.
 - 1) That the learned trial magistrate erred in law and fact by failing to properly evaluate the totality of the evidence adduced by both parties during the hearing of the suit before him.
 - 2) That the learned trial magistrate clearly failed to evaluate the evidence and pleadings before him thus arriving at the wrong decision.
 - 3) That the learned trial magistrate erred in law in failing to find that the respondent who had filed a counterclaim raising issues of fraud, had a duty to prove the alleged fraud to the standards required in law.
 - 4) That the learned trial magistrate's analysis of the case and evidence before him is full of contradictions.
 - 5) That the learned trial magistrate erred in law in failing to find that party who alleges fraud must specifically plead the said fraud and prove it to the standard required in law.
 - 6) That the learned trial magistrate erred in law and fact when he failed to distinguish that the process of transfer of un-adjudicated land is totally different from that of registered land hence arriving at an erroneous conclusion that the appellant failed to provide a copy of the transfer form.
 - 7) That the learned trial magistrate's decision was wrong as he arrived at pre-conceived decision which he tried to justify in his judgment.
 - 8) That the learned trial magistrate's analysis of the evidence and issues was wrong as he was clearly biased against the appellant and in favour of the respondent.
6. The appellant prayed for the appeal to be allowed, that the judgment of the lower court be set aside and judgment to be entered for the appellant as prayed in the plaint and for the costs of the appeal to be awarded to the appellant.
7. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 23rd February, 2024 through the firm of Mbaabu M'Inoti & Co. Advocates while the respondent filed his dated 4th April 2024 through the firm of Leonard K. Ondari & co. Advocates.

Appellant's Submissions

8. Learned counsel for the appellant gave an introduction and brief facts of the case and combined and argued grounds 1,2,4,7 and 8 of the appeal as one and grounds 3,5 and 6 together.
9. Regarding the first set of grounds it was submitted on behalf of the appellant that the appellant had adduced ample evidence to show that he had legally acquired the suit property vide the sale agreement dated 31st October, 2011 following which a title deed was issued to him in the year 2014. It is the appellant's submissions that unless the contrary is proved which burden rests upon the respondent who in his counterclaim raised issues of fraud, the appellant's legitimate ownership of the suit property remains unchallenged. The appellant's counsel cited Section 26 of the *Land Registration Act*.



10. With regard to grounds 3 and 5 of the appeal, the appellant submitted that despite the respondent alleging that the appellant acquired the suit property fraudulently, the respondent adduced no evidence to that effect which the trial court failed to consider and thus arrived at an unjust judgment. It was submitted on behalf of the appellant that other than making assertions of fraud, the respondent ought to have gone a step further to prove the same and further prove that the transfer of the suit property to the appellant was done without proper procedures of the law, which he did not. That the respondent adduced no evidence whatsoever, whether documentary or otherwise to support his allegations of fraud.
11. It was submitted on behalf of the appellant that it is trite law that in a case where fraud is alleged, it is not enough to simply infer fraud from the facts. That the party who makes the allegations must prove the fraud he so alleges. The appellant's counsel cited section 107 of the *Evidence Act*. It was submitted that the allegation to show that the appellant was party to the fraud rested on the respondent which burden it was submitted, he failed to discharge before the trial court. Learned counsel for the appellant relied on the case of *Kinyanjui Kamau Vs George Kamau* [2015] Eklr which cited the famous case of *Ndolo Vs Ndolo* (2008) 1KLR G&F) 742. That the above facts notwithstanding, the trial magistrate still went ahead to allow the respondent's counterclaim and granted the orders for refund of the consideration of the sale agreement. It was submitted on behalf of the appellant that in awarding the same, the trial magistrate failed to consider the intention of the parties when entering into the agreement, the time that had elapsed since the execution of the agreement and the fact that the appellant had already acquired title to the property despite the respondent failing to give him vacant possession. That additionally, the intention of the parties when entering the sale agreement over the sale of the suit property was to create a legally binding transaction before the law, subject to the custom implied terms and conditions in sale agreements. That the appellant having performed his duty under the agreement by paying the consideration amount, it was upon the respondent to deliver vacant possession of the land to the appellant as required under the law.
12. It was submitted on behalf of the appellant that the option of a refund of the consideration amount by the respondent is not only unfair but also untenable considering the time that had elapsed since the agreement was made. Further, that the appellant who had already taken steps to register the suit property in his name had initiated developments on the property which were only curtailed by the respondent's selfish behavior and that in the circumstances, it is only fair that this appeal is allowed so as to prevent the appellant from being subjected to more injustices.
13. With regard to ground 6 of the appeal, it was submitted on behalf of the appellant that contrary to a transaction on an already registered parcel of land, it is clear under the *Land Adjudication Act* (Cap 284) that every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer and point out his boundaries to the demarcation officer in the manner required. That upon demarcation, an adjudication record is prepared which is thereafter presented to the Chief Land Registrar for registration. It was pointed out that the appellant has stated in the memorandum of appeal that the suit property was un-adjudicated at the time of purchase after which he took legitimate steps to cause for registration of the land in his favour which did not involve use of transfer forms.
14. In light of the above, the appellant maintains that his suit was wrongfully dismissed since neither of the facts stated and raised in the pleading filed in the trial court were considered. That it is only through this court's intervention that the said glaring unjust errors can be reversed and the situation regularized. It is the appellant's submissions that he has demonstrated that he proved his case before the lower court on a balance of probabilities, but the learned trial magistrate failed to consider serious, relevant and obvious



issues and evidence which had been raised in the suit via pleadings and at the hearing before the trial court. It was submitted on behalf of the appellant that the appeal is merited and ought to be allowed.

Respondent's Submissions

15. It was submitted on behalf of the respondent that the appellant failed to prove his case. That whereas it is not in dispute that he who alleges must prove, the appellant had a duty to prove how the title was obtained. That the allegation by the respondent that he had not transferred land to the appellant directly and perfectly put the onus of proof squarely on the appellant.
16. The respondent's counsel cited Section 26 (1) of the *Land Registration Act* and submitted that fraud is what the respondent alleged in his amended defence. That the respondent denied ever transferring the land to the appellant, and therefore the onus or burden of proof shifted to the appellant to show how he got the land transferred to himself. That the holder of title must go beyond the title and demonstrate that the process of acquisition from inception was legal. Learned counsel for the respondent relied on the case of *Funzi Development Limited & others Vs County Council of Kwale* (citation not given), *Dina Management Company Limited Vs County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), *Athi Highway Developers Limited Vs West End Butchery Limited & 6 others* Civil Appeal No. 246/2013 and *Tarabana Company Limited Vs Sehmi & 7 others*, Civil Appeal No. 263/2019.
17. While agreeing that the process of transfer in an adjudication area under the *Land Adjudication Act* and the process under the *Land Registration Act* are different, it was submitted on behalf of the respondent that the appellant did not explain elaborately the process through which he acquired title. That section 23 of the *Land Adjudication Act* provides for preparation of adjudication record while Section 24 of the same Act provides for the adjudication register wherein all interests are recorded. The respondent's counsel also cited Section 26 of the same Act which provides for objection to adjudication register, and finally where no objection to the register in Section 26A, transfers are done in the adjudication register, one transferring an interest in land and the name of cancelled and the name of the transferee written in the register. It was pointed out that these records are available in the adjudication office. That these are documents that the appellant ought to have provided to the court to prove the genuine and/or legality of his title. That it was not enough to flash the title as proof. It was further submitted that on the other hand, the process under the Registration of *Land Act* (sic) provides for transfer forms, consent etc. That the record would bear witness to the respondent.
18. It was submitted on behalf of the respondent that this appeal lacks merit and should be dismissed with costs to the respondent.

Analysis and Determination

19. I have considered the record of appeal, the grounds of appeal and the submissions by both parties. The substance of the appeal are whether the appellant had proved his claim in *Tigania PMC ELC* suit Nos. E042 of 2020 against the respondent and whether the respondent's counterclaim was proved to the standard required in law.
20. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.
21. In the plaint, the appellant pleaded that on 31st October, 2011, he entered into a written agreement with the respondent for the sale of a portion measuring 0.10 acres out of land known as LR No. 4621 Uringu 1 Adjudication Section at a consideration of Kshs. 25,000/= which the appellant alleged he paid in full. The appellant pleaded that the respondent refused to honour the terms and conditions of



- the said contract by refusing to give the appellant vacant possession of the said land now registered in the name of the appellant who holds a title deed for the said land now known as LR No. Nyambene/Uringu 1/4621. The appellant stated that the respondent effected transfer and he was issued with a confirmation letter for the said land in 2013 and thereafter issued with a title deed in January 2014.
22. In his defence, the respondent denied that the suit land was at any time registered in the name of the appellant as alleged since the respondent never signed a transfer form. The respondent also raised a counterclaim seeking to be allowed to refund the consideration amount to the appellant as per the agreement.
 23. From the pleadings and the evidence adduced, it is not in dispute that the parties herein entered into a sale agreement over the suit land. It is also not in dispute that the agreed consideration was paid in full. Indeed, the respondent in his counterclaim sought to be allowed to refund the said consideration to the appellant.
 24. According to the appellant, the respondent signed the transfer form in his favour and he was subsequently issued with a title deed for the suit land. His only complaint was that the respondent has refused to give him vacant possession. On his part, the respondent seems to allege that the appellant's title was acquired fraudulently.
 25. I have perused the agreement for sale dated 31st October, 2011 between the respondent and the appellant which was produced as P exhibit 1. The same was for the sale of the suit land measuring 0.10 acres. The consideration was Kshs. 25,000/= . Clause 2 of the said agreement stated that the respondent acknowledged receipt of the whole consideration of Kshs. 25,000/= upon signing of the agreement. As already stated, the respondent does not deny receiving the purchase price in full as stated in the agreement for sale. The respondent however, prayed to be allowed to pay liquidated damages to the appellant as per the said agreement. The respondent pleaded that he had approached the appellant in regard to refunding the consideration amount but the appellant refused and rushed to court.
 26. I have also perused the title deed issued in the name of the appellant on 12th January, 2014. The same is for title No. Nyambene/Uringu 1/4621 measuring approximately 0.04 hectares which is about 0.10 acres, the size of the land that was the subject of the sale agreement between the parties herein.
 27. The suit land is admittedly under the operation of the *Land Registration Act* 2012. Under Section 26 (1) of that Act, a certificate of title issued by the registrar upon registration or to any purchaser of land upon a transfer is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 28. In this case, it is not in dispute that there was an agreement for sale of the suit land between the parties herein. There is also no dispute that the appellant paid the agreed purchase price in full at the time of the execution of the agreement, and the respondent acknowledged receipt of the same. The respondent has not alleged any breach on the part of the appellant. The appellant is the registered owner of the suit land. Therefore, as the registered proprietor of the land, the appellant is the absolute and indefeasible owner thereof.
 29. In this case the appellant tendered documentary evidence indicating that he purchased the suit land from the respondent and was issued with a title deed upon transfer. Whereas the respondent's case was that he did not execute any transfer form, the respondent did not explain under what circumstances he was willing to pay liquidated damages. According to clause 7 of the said agreement for sale, it was the defaulting party who was required to pay the innocent party a sum of Kshs. 50,000/=



being liquidated damages so caused and other costs arising therefrom. From his own pleadings, the respondent admittedly conceded that he was the one in breach of the agreement. Having gone through the material on record, I have not seen any allegation by the respondent that the appellant was in breach of the said agreement.

30. The next issue to consider is whether the respondent had proved fraud against the appellant and whether the learned trial magistrate was justified in allowing the respondent's counterclaim. It is factual that there was an agreement between the parties herein over the sale of the suit land. It is also factual that the appellant is the registered owner of the suit property which is prima facie evidence of ownership. It was held in the case of *Republic Vs Senior Registrar of Titles ex-parte Brookside Court Limited* [2012] eKLR that statutorily, the sanctity of title to land is assured and protected under section 24, 25 and 26 of the *Land Registration Act*. Although it is equally, true that ownership can be challenged on the grounds of fraud or misrepresentation to which the proprietor is proved to be a party, in this case, there was no evidence that was adduced by the respondent to prove that the appellant's title which he acquired pursuant to an agreement between him and the respondent was acquired fraudulently or illegally. It has been held that charges of fraud should not be lightly made or considered. Under Order 2 Rule 4 of the civil Procedure Rules, matters of fraud must be specifically pleaded while rule 10 requires that the particulars of fraud must be given. It is also trite law that fraud must be strictly proved. And although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required. It is not allowable to leave fraud to be inferred from the facts. This is due to the seriousness of the offence of fraud which is criminal in nature. In this case, the respondent not only failed to plead the particulars of the alleged fraud, but he also failed to adduce any evidence to support the same. When fraud was alleged by the respondent, the onus was on him to discharge the burden of fraud. See *Ndolo V Ndolo* (2008) 1 KLR (g & F) 742. Under Section 107 to 109 of the *Evidence Act*, the burden of proof was on the respondent to prove that the appellant acquired title to the suit property fraudulently.
31. Having considered the material on record, it is my view that the respondent did not prove fraud against the appellant to the required standard. In my view, the learned magistrate erred in finding that the respondent had proved his counterclaim. Further, the trial court erred in finding that the appellant had not proved his case against the respondent. In my view, the appellant had demonstrated satisfactorily the manner in which he acquired his title to the suit land. Evidence was availed to confirm that the appellant purchased the land from the respondent. This was also supported by the respondent who merely sought to refund the purchase price without giving any justification for such a prayer. Under Section 25(1) of the *Land Registration Act*, the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration shall not be liable to be defeated except as provided in that Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. Section 24 of that Act provides that 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. Therefore, as the registered proprietor of the suit land, the appellant was entitled to enjoy the rights and privileges belonging or appurtenant thereto. It is my finding that the appellant had proved his case against the respondent on a balance of probabilities and was entitled to the reliefs sought in the plaint.
32. In the result, I find that this appeal has merit and the same is allowed. The judgment and decree of the lower court is set aside and I substitute it with an order allowing the appellant's suit in the subordinate court and the respondent's counterclaim is dismissed.
33. Costs of this appeal and of the lower court are awarded to the appellant against the respondent.



34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF OCTOBER, 2024.

IN THE PRESENCE OF

Court Assistant – Tupet

Ms Kithinji holding brief for Mbaabu M’Inoti for appellant

C.K YANO

ELC JUDGE

