



REPUBLIC OF KENYA



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Makewa & another v Muli & 2 others (Environment and Land Appeal 19 of 2020) [2024] KEELC 6425 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 19 OF 2020
A NYUKURI, J
OCTOBER 2, 2024**

BETWEEN

JACKSON MAKEWA 1ST APPELLANT

RACHEAL MAWEU 2ND APPELLANT

AND

ROSE MWAIKI MULI 1ST RESPONDENT

JOSEPH MUTUNGA MULI 2ND RESPONDENT

**KATELEMBO ATHIANI MUPUTI FARMING AND RANCHING
COOPERATIVE SOCIETY LIMITED 3RD RESPONDENT**

(Being an Appeal from the Judgment of Senior Principal Magistrate Honourable E.H.Keago, delivered on 28th May 2020 in Machakos CMC ELC Case No. 36 of 2018 .)

JUDGMENT

Introduction

1. This appeal was filed by Jackson Makewa and Racheal Maweu challenging the judgment of Honourable E. H. Keago (SPM), delivered on May 28, 2020 in Machakos CMC ELC No. 36 of 2018. In the impugned judgment, the learned trial magistrate found that the appellants were trespassers on the suit property, and entered judgment for the plaintiff who is the respondent in this case and granted the orders sought in the plaint.

Background

2. By a plaint dated June 22, 2018 the plaintiffs sought against the defendants, the following orders;



- a. An order of permanent injunction restraining the defendants from trespassing, alienating, interfering and or dealing with the plaintiffs' parcels of land being Title No. Athi River/Athi River/Block 1/3387 and Title No. Athi River/Athi River Block 1/3598.
 - b. An order of eviction against the defendants.
 - c. Costs of the suit.
3. The plaintiffs averred that at all material times they were the registered proprietors of parcels of land known as Title Nos. Athi River/Athi River Block 1/3387 and Athi River/Athi River Block 1/ 3598 each measuring 0.2 hectares (hereinafter referred to as the suit property). They also stated that in September 2010, they acquired the suit property by purchase from Collins Ngeene Mutinda, a member of Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited (hereinafter referred to as Katelembo).
 4. Further, they alleged that Katelembo's surveyor identified and showed them the suit properties but they found that the defendants had respectively constructed semi permanent structures thereon. They stated that on 23rd March 2017, a Government Task Force established to handle land disputes before processing of the titles of members of Katelembo, heard the parties herein and made a decision in favour of the plaintiffs. They also stated that in October 2017 they were informed by Katelembo that they needed to relocate in regards to parcel Athi River/Athi River Block 1/3598 to the correct location thereof. They also alleged that although the Task Force and Katelembo asked the defendants to vacate the suit property for lack of documents to support their occupation, but that they refused to comply.
 5. The suit was opposed. The defendants filed a statement of defence and counterclaim dated 26 February 2019 and amended on 14th May 2019. They added Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited as the 3rd defendant in the counterclaim. The 1st and 2nd defendants denied the plaintiffs' claim. The 1st defendant alleged that he was in occupation of plot number 2440X at Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited which he took possession in 2006 having purchased the same from Sammy Ndunda Muindi on 28th March 2006. On the other hand, the 2nd defendant stated that she had used plot number 1779 at Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited, from December 2007 having validly purchased the same on 20th December 2007. The defendants maintained that the suit properties did not belong to the plaintiffs. They also alleged that they have been in occupation of the same for over 12 years.
 6. They stated that on 9th September 2010, the plaintiff and Katelembo acted fraudulently and illegally transferred the suit properties to the plaintiffs while knowing that the same belonged to the defendants.
 7. Therefore, the defendants sought the following orders;
 - a. A declaration that the 1st plaintiff in the counterclaim is the legal owner of plot No.2440x whilst the 2nd plaintiff in the counterclaim is the lawful and legal owner of plot No. 1779 both at Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited.
 - b. A declaration that the transfer of plot No. 2440x and 1779 to the 1st and 2nd defendants in the counterclaim was fraudulent, unlawful and void.
 - c. An order of permanent injunction restraining the defendants in the counterclaim, their agents and or servants from entering, alienating, transferring, or in any other way interfering with plot Nos. 2440x and 1779 at Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited.



- d. Costs of the suit herein and of the counterclaim plus interest at court rates.
 - e. Any other relief which this court deems fit and just to grant.
8. The suit proceeded to hearing by way of viva voce evidence. The plaintiffs presented three witnesses while the defendants presented four witnesses.

Plaintiffs' evidence

9. PW1 was Rose Mwaiki Muli, who adopted her witness statement as her evidence in chief and produced documents filed. It was her testimony that together with the 2nd plaintiff they were the registered proprietors of Title Nos. Athi River/Athi River Block 1/3387 and Athi River/Athi River Block 1/3598 each measuring 0.2 hectares, having purchased the same on 2nd September 2010 from one Collins Ngeene Mutinda, a member of Katelembo.
10. She informed court that a transfer of the suit properties from Collins to themselves was done at the offices of Katelembo and the latter's surveyor took them to the ground and showed them the two properties. she also stated that when they reached the ground they discovered that the 1st defendant had constructed a semi-permanent structure on plot number 2440. They stated that when she asked the 1st defendant to vacate the latter informed her to sort out the matter with Katelembo. According to her, having followed up the matter with Katelembo, she was given the history of the suit property stating that plot number 2440 was first allocated to Mutisya Muli who transferred it to Phoebe Muli. That the property was transferred to Phoebe Muli who transferred it to John Ngonze who subsequently transferred it to Collins Ngeene Mutinda who finally transferred it to the plaintiffs. She maintained that that the 1st defendant did not appear anywhere in the records of Katelembo.
11. The witness further stated that she engaged one Peter Muthungu to follow up on the processing of the titles for the suit property and he was the one who represented them before the Government Task Force that was established to handle land disputes before titles could be processed. She stated that the task force ruled in their favor against the 1st defendant and allowed Katelembo to process the title deed for plot number 2440 in the plaintiffs' joint names, but that the 1st defendant is yet to vacate the suit property. She stated that in 2017 she was informed by Mr. Muthungu that also plot number 1779 had issues having been claimed by someone else when that plot had been in possession of Mr. Muthungu.
12. She stated that they attended Katelembo to settle the matter and having paid the survey fees on 8th November 2017, the surveyor of Katelembo took them to the correct plot where they found that the 2nd defendant had constructed a semi-permanent house thereon. That again the Task Force heard the dispute, asked the 2nd defendant to provide ownership documents, which she failed and therefore she was requested to vacate the property but failed to do so. She maintained that the defendants have no right to be on the suit properties because the plaintiffs are the legitimate proprietors thereof.
13. On cross examination she stated that when she bought the two parcels of land from Collins they confirmed the location of the land and that there was no one in occupation of the suit properties. She maintained that the property had been held and owned by different people before it was transferred to her. She stated that according to the map there is no plot No. 2440x, although she did not have a surveyor's report to confirm plot No. 2440. She stated that when she purchased plot number 2440 she did not know there was someone in occupation and only became aware when she needed to fence the plot. She maintained that the defendants had been given opportunity to be heard before the Task Force but failed to avail supporting documents.



14. PW2 was Peter Munela Muthungu. He stated that he acted as the agent of the 1st plaintiff in 2010 when she purchased the suit property from Collins Ngeene Mutinda, a member of Katelembo. Further that upon purchase of the suit properties by the plaintiffs it emerged that the 1st defendant claimed plot number 2440 and had constructed a semi-permanent structure thereon. That he was instructed by the plaintiffs to follow up the matter with the surveyor of Katelembo, whereof the referred them to the Government Task Force that handled such disputes.
15. The witness stated that he presented the plaintiffs' documentation to the Task Force for the two plots, gave evidence including the history of how the suit property changed hands from Mutisya Muli up to the plaintiffs and confirmed that the Task Force decided in favor of the plaintiffs. He also averred that in October 2017, while farming on plot number 1779 the surveyor of Katelembo informed him that he was farming on someone else's land, was asked to vacate and he immediately took up the matter with Katelembo. That he paid survey fees on 8th November 2017 and was taken to the correct location of plot number 1779 where they found the 2nd defendant having constructed a semi-permanent structure. That the dispute between the Plaintiffs and the 2nd defendant was heard before the Task Force and a decision made in favor of the plaintiff while the 2nd defendant was asked to vacate but refused.
16. On cross examination, he confirmed that there was a structure on plot number 2440 before the purchase of the suit property and that initially he had been shown plot number 1882 and not 1779 and when they paid the surveyor fees, he was shown the location of plot 1779. It was also his testimony that he is the one who appeared before the Task Force and by then, the plaintiffs already had titles to the suit properties.
17. PW 3 was Romania Kitusa, a private surveyor and a member of Katelembo Task Force formed in 2015 because of the mistakes committed by Katelembo committee members who sold land belonging to the members. She stated that the Task Force was formed by the Ministry of Cooperatives and she confirmed that the plaintiffs produced in court the ruling of the Task Force dated 23rd March 2017 regarding plot number 2440 and 2440x. She testified that plot number 2440 was occupied by Jackson Makewa and that when they summoned him he provided documents for plot No. 2440x which plot does not exist.
18. The witness stated that plot number 2440 was balloted and allocated to member number 1730 called Mutisya Muli who is now deceased. Further that that plot was transferred to Phoebe Muli then to Ngozi, who then sold it to Rose Mwaiki Muli. According to her, although Sammy Ndunda was alleged to have bought the suit property from Katelembo, the latter could not sell the land belonging to members and that the name of Sammy Ndinda does not appear anywhere in the records of Katelembo.
19. He also stated that they dealt with property number 1779 and found it was in occupation by Racheal Maweu who was unable to provide documents to support her occupation. She insisted that from the availed evidence the suit property belongs to the plaintiffs. She produced the Task Force finding as the plaintiffs' exhibit.
20. In cross examination, she stated that she is a private surveyor and became a surveyor at Katelembo in 1996. Further that she dealt with the plaintiffs when they appeared before the Task Force. She added that there was an issue of sale of members' land by the previous committee members of Katelembo, whereof Sammy Muindi purportedly purchased a member's land which had been balloted by member No. 1730. She insisted that Sammy Ndunda purchased land from unknown people and he did not avail a sale agreement. Concerning plot No. 2440x, she stated that the same is not in any map of Katelembo. She also stated that the documents showing transfer by the defendant were from Katelembo who altered records as plot No. 2440x does not exist. She also confirmed that they did a site visit to the



property and that their role as Task Force was to correct the records because there had been fraudulent transactions and the manipulation of the records. That marked the close of the plaintiffs' case.

Defendants' case

21. DW1 was Jackson Kyalo who adopted his witness statement dated 26th February 2019 as his evidence in chief and produced documents filed. It was his testimony that he lawfully purchased the plot known as 2440x from one Sammy Muindi Ndunda on 28th March 2006. That before purchase, he verified the details of the land from Katelembo and was shown the land on the ground by the surveyor and the owner Sammy Muindi Ndunda. According to him, he established that Sammy had purchased the said plot in 2000. That he took possession of the said plot and started developments thereon by constructing a house and has been an occupation on the land from 2006 up to date. He stated that the land was successfully transferred from Sammy to himself and that John Ngonze alleged to have been one of the previous owners was even a witness to the transaction. He stated that his occupation on the property has been peaceful without objection from anyone until 2017 when the plaintiffs began claiming the property as purchasers. He claimed that the plaintiffs had never visited the suit property before the alleged purchase or even upon obtaining title. He confirmed that he appeared before the Task Force and alleged that before he could bring his evidence and documents, the Task Force proceeded to give a verdict without giving him a hearing.
22. He maintained that plot No. 2440x which was transferred to him exists and that Katelembo should explain how the said plot changed hands without their knowledge. He stated that the transfer of title of the plaintiffs was done fraudulently and therefore the same should be cancelled.
23. On cross examination, he confirmed that he had not produced any documents from Katelembo to show that he verified ownership of the suit property before purchase. He also stated that John Ngonze was one of the owners of the property before he bought it and that he appeared before the Task Force many times. He further averred that he availed before the Task Force the original transfer documents and that he appealed against the decision of the Task Force as per his letter dated 4th April 2018 and conceded that he did not complain about not being given a hearing. He also confirmed that the Task Force found that plot No. 2440x does not exist but that his exhibit 4 shows that they said plot exists although he did not have a map to confirm that allegation. He insisted that Sammy owned the plot before he purchased it and that he paid a sum of Kshs. 34,000. He stated that he had not processed title because the property was in dispute.
24. DW2 was Rachel Maweu who adopted her witness statement of 26 February 2019 as her evidence in chief and produced the filed documents. Her testimony was that plot number 1779 was sold to her by one Sammy Ndunda Muindi on 20th December 2007 and that before purchase, she verified from Katelembo offices and confirmed that Sammy had validly purchased the said plot from officers of Katelembo. She stated that Sammy and the surveyor of Katelembo showed her the location of the said plot and immediately thereafter she took possession of the same, constructed her house and has been living on that plot since then to date.
25. She further averred that in March 2018 some people came to her land in possession of a title thereof claiming that it belonged to them but stated the latter had never been on the land before they allegedly purchased the same. She therefore stated that the land belongs to her and that the plaintiffs obtained title by fraud.
26. On cross examination, she stated that she entered into a land sale agreement with Sammy Ndunda Muindi where she paid Kshs. 50,000/= for half an acre, but was not issued a receipt for the same. She also confirmed that she had not produced a search from Katelembo. She stated that she saw the name



of Sammy Ndunda Muindi in the records of Katelembo for plot number 1779 and that the task force visited the suit property, but that they did not ask for any document.

27. DW3 was Sammy Ndinda Muindi who adopted his witness statement of 26th February 2019 as his evidence in chief and stated that in the year 2000, he purchased several parcels of land from Katelembo and among them were plot numbers 2440x and 1779 each measuring ½ an acre. Further that before the purchase, he was shown the plots on the ground which he fenced but did not construct anything on the plot. He also stated that on 28th March 2006 he entered into a land sale agreement with Jackson Makewa and sold plot No. 2440x. That the purchaser confirmed the plot ownership particulars from Katelembo and that together with the surveyor they showed the purchaser the location of the plot. According to him, John Ngonze was one of the witnesses to the sale of land although he is alleged by the plaintiffs to have owned the plot. He stated that they later visited the offices of Katelembo where he transferred the plot to Jackson on payment of the requisite transfer fees on 20th December 2007. He also stated that he entered into a sale of land agreement with Rachel Maweu the 2nd defendant for sale of plot number 1779 and just like the 1st defendant, she also confirmed that the plot belonged to this witness. The witness further stated that together with the surveyor, they showed her the plot. He stated that he has never transferred plot number 1779 to the 2nd defendant but transferred it to his minor son who was to transfer to the 2nd defendant upon payment of the balance of the purchase price.
28. He stated that both defendants had taken possession of the suit properties upon purchase and added that there had been no claim by anyone on the suit property until 2017 when one Peter Muthungu started claiming plot number 2440x and in 2018 when he claimed plot number 1779. He further confirmed that Jackson Makewa was summoned to appear before the Task Force where he also was present and claimed that they were asked to produce ownership documents from Katelembo but that before they could bring documents, the Task Force proceeded to give their verdict without giving them a hearing. According to him, he established from Katelembo that plot No. 2440x exists and that officers of Katelembo should explain how the plot changed hands. He claimed that the transfer of the suit property to the plaintiffs was done fraudulently.
29. On cross examination, he stated that when he bought the suit property, and entries in regard to the same were made in a big book at Katelembo, which entries were seen by the defendants in his absence. He conceded that he had not produced any documents to demonstrate the alleged purchase of the suit properties from Katelembo. He also stated that he sold plot No. 2440x to the 1st defendant at Kshs. 45,000/= while he sold the other plot No. 1779 to the 2nd defendant at the sum of Kshs. 35,000/=. He maintained that John Ngonze witnessed the agreement but never owned the suit property. He also stated that he had not been given any documents by Katelembo. He further alleged that he transferred plot number 1779 to his son who was still a minor aged about 10 years and that his son's name was appearing in the records at Katelembo. He also claimed that he was not aware that there was no plot No. 2440x. He confirmed that they were heard before the Task Force and that he was member number 2051 and that he bought the suit property from the officials of Katelembo but was not aware that plot number 2440 was not available as it had been given to a member of Katelembo. He confirmed that there were plots which had been given to members and that it is the officials of Katelembo who added the prefix "x" to the number of the land. He stated that he was not the one who introduced "x" on plot number 2440.
30. DW4 was Peter Mbithi Mwarabu who adopted his witness statement of 26th February 2019. His testimony was that on 20th December 2007 he witnessed a land sale agreement between Sammy Ndunda and the 2nd defendant for parcel of land known as plot number 1779 measuring half an acre. That before executing the agreement, they established from Katelembo that the land in question belonged to Sammy Ndunda Muindi and that both Sammy and the surveyor from Katelembo showed them where



the parcel was situated. He maintained that after the purchase, the 2nd defendant took possession of her property and constructed her house and has been living there with her family since 2007 to date. He insisted that the plot number 1779 belong to the 2nd defendant and she should not be deprived of the same.

31. On cross examination he stated that he signed the agreement of 20th December 2007 which was also signed by Sammy and the 2nd defendant. He also claimed that the sale agreement was done in Kamba language but he didn't know whether the 2nd defendant knew how to read. According to him, the defence exhibit number 6 showed that the sale was for one acre and that he did not know the purchase price but when they went to Katelembo he was shown a booklet which had the name of Sammy Ndunda Muindi. He also stated that he also owns a plot which he bought from Katelembo and claimed that the 2nd defendant had unpaid balance in regard to the consideration. That marked the close of the defence case.
32. Upon consideration of the pleadings, evidence and submissions, the trial court found that the plaintiffs had proved their case on the required standard and allowed their claim; which judgment the defendants were aggrieved with and filed a Memorandum of Appeal dated 26th June 2020 raising 4 grounds of appeal as follows;
 - a. The learned magistrate erred and misdirected himself in law and in fact when he based his findings on suspect title deeds which had been issued for other parcels of land other than the disputed parcels of land on the ground.
 - b. The learned magistrate erred and misdirected himself in law and in fact when he failed to hold that the plaintiffs in the primary suit had acquired the titles to the two parcels of land through a conspiracy and fraudulent dealings with the third respondent Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited.
 - c. The learned magistrate erred and misdirected himself in law and in fact when he disregarded the undisputed facts that the appellants had lawfully bought and peacefully occupied the subject parcels of land from a party who had previously been procedurally allocated the same by the third respondent.
 - d. The learned magistrate erred and misdirected himself in law and in fact when he failed to make a declaration that the transfer of the subject parcels of land by the 3rd respondent to the 1st and 2nd respondents had been effected through fraud, misrepresentation and/or mistake and consequently the same ought to have been revoked and fresh titles issued to the appellants.
33. Consequently, the appellants sought the following orders;
 - a. The appeal herein be allowed with costs.
 - b. The judgment and/or decree of the subordinate court be reversed and substituted with an order allowing the appellants' claim as prayed in the lower court with costs.
34. The appeal was canvassed by way of written submissions. While the 1st and 2nd respondents filed their submissions dated 3rd October 2023, the appellant did not file their submissions.

The 1st and 2nd respondents' submissions

35. On the first ground of appeal, counsel for the 1st and 2nd respondents submitted that the testimony of PW3 who was a member of the Government Task Force established to rectify mistakes committed by previous committees of Katelembo, the 3rd Respondent, was clear that the 1st appellant failed to prove



- ownership of the suit property after being given 21 days to produce documentations in that regard. Counsel also submitted that the Task Force found that the 1st and 2nd respondents have the necessary documents to establish ownership of plot number 2440 and therefore they should be registered as owners thereof.
36. Regarding plot No. 1779, counsel submitted that the 2nd appellant failed to produce a single document to support her ownership of that plot and that it is the 1st and 2nd respondents who produced evidence and documents to show that they are owners thereof. Counsel argued that the testimony of PW3 was not shaken on cross examination, that hence the trial court was right in finding that the respondents' titles were clean and without mischief.
 37. Counsel relied on the case of *Arthi Highway Developers Limited v. West End Butchery Limited & Others* and Sections 24, 25 and 26 of the *Land Registration Act*, and submitted that the trial court was right in dismissing the appellants' suit as they failed to prove fraud against the respondents.
 38. The court was also referred to the case of *Esther Ndegi Njiru & Another v. Leonard Gatei* [2014] eKLR as well as sections 107 and 109 of the *Evidence Act*. Counsel argued that the appellants failed to discharge their burden of proof for their allegations.
 39. On the 3rd ground of appeal, counsel submitted that the evidence on record shows that the appellants purchased the suit properties from an individual who had no proprietary interest in the suit properties. Further that the Task Force gave the appellants opportunity to present evidence and it was noted that their plot was known as 2440x whereof the 1st appellant could not explain how the suffix "x" was entered thereon and therefore failed to establish ownership of the suit property. Counsel insisted that parcel No. 2440x is non-existent.
 40. It was further submitted for the 1st and 2nd respondents that the 1st appellant's evidence in cross examination confirmed that he did not verify from the third respondent if plot number 2440x existed in the first place and he did not have a map to indicate the location of that plot. The 1st appellant was faulted for failing to appeal against the decision of the Task Force and that he did not produce a search from the 3rd respondent confirming that Sammy Ndunda Muindi was the proprietor of the suit property. Counsel further submitted that it was clear that Sammy Ndunda did not have evidence or documentation to prove he purchased the two disputed parcels of land from the 3rd respondent and that his evidence was inconsistent as he also confirmed that he was not aware how the suffix "x" was introduced on plot number 2440. Counsel further submitted that Sammy Ndunda made matters worse when he confirmed that he transferred plot number 1779 to his minor son in 2012 after he had sold it to the 2nd appellant in 2007.
 41. Counsel maintained that having failed to demonstrate lawful ownership of the suit property by Sammy Ndunda, the appellants failed to prove proper and lawful ownership of the suit property and that therefore the trial court was right to refer to them as trespassers. Counsel cited the case of *Merit Development Limited v. Lenana Investment Limited & 2 Others* [2018] eKLR for the proposition that where a vendor obtains property fraudulently even though a purchaser thereof did not contribute to the fraud, nevertheless such purchaser's title is not protected in law. Reliance was also placed on the case of *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others* (2014) eKLR for the proposition that parties are bound by their pleadings.

Analysis and determination

42. The court has carefully considered the appeal, the 1st and 2nd Respondents' submissions and the entire record. This being a first appeal, the duty of this court is to reevaluate, reanalyze and reassess the



- evidence before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.
43. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;
- “An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
44. Having considered the grounds of appeal raised in the Memorandum of Appeal by the appellants, my view is that the same raises two issues for determination;
- a. Whether the appellant’s occupation of the suit property was unlawful.
 - b. Whether the appellants proved fraud and illegality regarding the respondents’ acquisition of the suit property.
45. It is not disputed that the suit properties are all registered in the names of the respondents in this case. Section 26 of the *Land Registration Act* provides for conclusiveness of title and the exception there too as follows;
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.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
46. Therefore, registration vests in a proprietor absolute and indefeasible rights, unless there is evidence that the acquisition of such title was by fraud, misrepresentation, illegality or corruption, whether or not the registered proprietor was party thereto.
47. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009, the Court of Appeal held that:-
- We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.
48. It is trite that fraud ought not only be pleaded but must be strictly proved, and the standard of proof for fraud in civil cases is higher than the standard required in ordinary civil matters of the balance of probabilities, but is slightly lower than the standard of proof required in criminal cases of beyond reasonable doubt.



49. In the case of *Kinyanjui Kamau v. George Kamau* [2015] eKLR the court stated that:

It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.

50. In the instant case, the respondents argued that they were the lawful registered proprietors of the suit property having purchased the same from one Collins Ngeene Mutinda. They gave the history of the suit property and stated that the same was allocated by Katelembo to Mutisya Muli, now deceased, who was its member number 1730. That the said member transferred the property to Phoebe Nelson Muli, who transferred it to John Ngungu Ngozi, then Ngozi transferred to Collins Ngeene Mutinda who sold it to the respondents herein.
51. The court has considered the decision of the Government Task force dated 23rd March 2017. The same restates the history of plot No. 2440 from Mutisya Muli down to the respondents herein. The decision also shows that the 1st appellant was granted 21 days to avail his documents of ownership but he failed to produce the same. The letter by Katelembo dated 25th April 2015 shows that their records showed that Collins Ngeene Mutinda was the owner of plot No. 2440. The respondents produced transfer forms to show that the said property was transferred to them with the approval of Katelembo. This chronological explanation of how the respondents acquired the suit property was not shaken in cross examination, and I am therefore convinced that the respondents’ acquisition of the suit properties was lawful.
52. The appellants pleaded particulars of fraud as against the respondents that they failed to disclose to the land registrar that parcel No. 2440x was purchased by the appellants from Sammy Ndunda, and that the respondents altered the records of the 3rd respondent in favour of the 1st and 2nd respondents. The appellants having been challenged to demonstrate the existence of plot No. 2440x, they were not able to demonstrate that the said plot existed and or that it is the same as plot No. 2440, as they could not explain the basis for the suffix “x” added to No. 2440. Regarding plot No. 1779, apart from the sale agreement produced by the 2nd appellant, there was no evidence produced to show lawful acquisition of the same by the purported seller. On whether they demonstrated alteration of the 3rd respondent’s records in regard to plots 2440x and 1779, they ought to have produced the earlier records showing their ownership and the latter records showing the alleged alterations. However, no record from the 3rd respondent was produced, and therefore there is no proof of alteration of the 3rd respondent’s records in favour of the 1st and 2nd respondents as claimed by the appellants. Therefore, it is clear that the appellants failed to prove their particulars of fraud as pleaded against the respondents or at all.
53. From the evidence presented as analyzed above, I find and hold that the respondents proved lawful acquisition by purchase of the suit property from the lawful owner thereof one Collins Ngeene Mutinda, and on the other hand, the appellants failed to prove fraud as against the respondents.
54. The appellants have argued that they proved ownership of the suit property by demonstrating that they purchased the same from Sammy Ndunda Muindi. The appellants and the said Sammy Ndunda did not produce any evidence to show that Sammy Ndunda Muindi purchased the suit property from the 3rd respondent as he did not have a sale agreement or evidence of payment of consideration. In



addition, from the evidence of PW3 who was a member of the Government Task Force, it is clear that the committee members of the Katelembo had been unlawfully selling members' properties without authority. This evidence was not challenged in any manner. The evidence that the suit property was originally allocated to member No. 1730 and subsequently transferred to other owners up to the respondents was not rebutted and therefore Katelembo had no authority to sell the suit property to Sammy Ndunda, since at the time of the alleged sale the suit property did not belong to Katelembo. I therefore find and hold that the appellants could not lawfully purchase the suit property from Sammy Ndunda as he was not the lawful owner thereof, the same having been previously owned by Mutisya Muli and having been transferred to subsequent owners up to the respondents.

55. Since the appellants' acquisition of the suit property was unlawful, their occupation thereon is also unlawful and amounts to trespass.
56. In the premises, I agree with the findings of the trial court that the appellants failed to demonstrate lawful acquisition of the suit property, and their occupation being illegal, they were liable for eviction. Therefore, there is no justification for this court to interfere with the findings of the trial court.
57. The upshot is that I find no merit in this appeal which I hereby dismiss with costs to the 1st and 2nd respondents.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 2ND DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Nyaata holding brief for Mr. Mwalimu for appellants

Mr. Kurui for respondents

Court assistant – Josephine

