



**Ngoroi & 2 others v Elikana (Environment and Land Appeal
4 of 2020) [2024] KEELC 6761 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 4 OF 2020**

**A KANIARU, J
OCTOBER 3, 2024**

BETWEEN

ABRAM NJERU NGOROI 1ST APPELLANT

WILSON IRERI ELIKANA 2ND APPELLANT

ELIAS KATHURI ELIKANA 3RD APPELLANT

AND

JOYCE MARIGU ELIKANA RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgement of the lower court (Honourable M.N Gicheru, Chief Magistrate, as he then was) in Embu CM ELC No. 9 of 2019 delivered on 09.09.2019. It sets forth the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in finding that the registration of the respondent as the owner of land parcel Ngandori/Kirigi/6350 was not founded on fraud.
 2. The learned trial magistrate erred in law and fact in failing to abide by the conventional principle of law on cancellation of titles.
 3. That the learned trial magistrate failed to consider the evidence adduced by the appellants thereby reaching an erroneous decision.
 4. The learned trial magistrate misdirected himself in failing to consider the submissions made by the appellants and the legal authorities thereupon supplied thus ignoring the principle of ratio decidendi.
2. The appellant is asking for orders that:
 - a. This appeal be allowed.



- b. This honorable court do proceed and cancel the title to land parcel no. Ngandori/Kirigi/6350.
 - c. That the registration of land parcel Ngandori/Kirigi/6350 reverts to Ephantus Njagi Elikana Ngoroi as the administrator of the estate of Elikana Ngoroi Njakambi.
 - d. This honorable court do award the appellants the costs of this appeal and in the lower court.
 - e. The judgement and decree of the honorable principal (Sic) magistrate delivered on 04.11.2021 be set aside and the respondent's suit Siakago MCL & E No. 94 of 2020 be dismissed with costs to the appellant.
3. The appellants had impleaded the respondent in the lower court by way of a plaint dated 28.01.2019 seeking an order for the cancellation of the title to land parcel Ngandori/Kirigi/6350, currently registered in her name, then as second defendant so that it could revert to the name of Ephantus Njagi Elikana Ngoroi, who was 1st defendant and now not a party in this appeal. They also sought for the costs of the suit. It was pleaded that the parties are all siblings and children of the late Elikana Ngoroi Njakambi and Martha Rwamba Ngoroi. That Ephantus Njagi is said to have been appointed as the administrator of the estate of their late father, which estate comprised of among others, land parcel Ngandori/Kirigi/386. It was said that all the children of the deceased got a share of the estate. Their late mother also got 0.30 Ha allocated to her but she died before her share could be registered in her name. The appellants alleged that they discovered their late mother's share of the estate, allocated as land parcel 6350, had through collusion and conspiracy of the respondent and Ephantus Njagi, been fraudulently transferred to the respondent by the said Ephantus without their consent. They then set out the particulars of fraud.
 4. The respondent filed a defence dated 12.02.2019 and denied the appellants claims of fraud or conspiracy. It was her case that their deceased mother, before she died, had declared that her share of the suit land was to be allocated to her. It was also her case that the said Ephantus had willingly transferred the suit land to her.
 5. Ephantus, then as 1st defendant, filed a defence in the lower court dated 12.02.2019 where he contended that he inadvertently transferred land parcel 6350 to the respondent. He alleged that he suspected there was a collusion between the surveyor and the respondent as it was not his intention to transfer the land to her. He further stated that the title the respondent holds is illegal as it was acquired irregularly and illegally.
 6. The record shows that parties agreed to rely on their filed documents and written submissions to have the suit determined. The appellants testimony, according to their written statement, remained the same as set out in their plaint and they produced the following documents in evidence: a copy of mutation form for land parcel NGANDORI/KIRIGI/386, a copy of certificate of confirmation of grant in Embu Succession Cause no. 174 of 1995: copy of green card in respect of land parcel no. Ngandori/Kirigi/6350 and a demand letter and notice dated 07.01.2019.
 7. The respondent's case on the other hand, according to her written statement, was that she had been given the suit land by their mother before she died in the presence of all the other siblings to enable her take care of her six children and those of her deceased sisters - Elizabeth Wambeti and Charity Kanini's. That thereafter the administrator being Ephantus Njagi willingly transferred the said portion to her on 22.03.2018 and she got the title deed. That after she got the title deed, she started being accused of acquiring it fraudulently. That she was in fact reported to the Criminal Investigation department. Finally, they were summoned, presumably with the appellants, by the land registrar to appear before him. That on that day, the administrator adamantly refused that he was the one who signed the transfer forms and so, the land registrar advised them to go to court.



8. She produced in evidence a certificate of official search for a land parcel 14536, a certificate of search for parcel no. 6350, confirmed grant dated 28.04.1995 for succession cause no. 174 of 1995, a letter dated 22.03.2018, a letter dated 17.05.2013, a letter dated 06.03.2012, a letter dated 20.09.2018 and a green card dated 05.07.1999 for land parcel 386.
9. The 1st defendant's testimony according to his written statement was that the respondent was a beneficiary of 1/4 acre out of their mother's portion of land which case also applied to his other sisters. That in the year 2018, the respondent and his other sisters approached him to subdivide and distribute their respective portions to them. They engaged a surveyor and he executed transfer documents in their favour. That he came to realize later that he had transferred land parcel 6350 which belonged to their mother to the respondent which was not his intention. That the registration of the respondent as the owner of the land parcel is illegal as they ought to have substituted their late mother in the succession cause before distributing her portion of land. That he acknowledged it was a mistake which he did unknowingly though he suspected foul play between the surveyor and the respondent. He was asking that the title to land parcel 6350 be cancelled to enable them follow the proper procedure of implementing the confirmed grant in respect of their late father.
10. The trial court delivered judgement on 09.09.2019 and found that neither fraud nor inadvertence was proven by the appellants or Ephantus who was the 1st defendant. That the appellants failed to establish fraud against the respondent, who demonstrated a protracted dispute over the suit land that resolved in her favor. The court felt that the 1st defendant, Ephantus Njagi, did not adequately explain the inadvertent transfer of land and that the appellants did not counter the plausible explanation provided by the respondent for being given the suit land, due to her extra responsibilities towards her mother and the children of her two deceased sisters. The court found that the appellants who had the burden of proof had to prove fraud against both defendants in the lower court and consequently dismissed their case. That is what led to the appeal now before me.
11. The appeal was canvassed by way of written submissions. The appellants submitted that the respondent had already received her share of the estate, being parcel Ngandori/Kirigi/14536, and should not benefit twice while other beneficiaries received only their rightful portions. They argued that fraud was admitted by the 1st defendant and as such, the title of Parcel 6350 should be canceled. The appellants invoked the provisions of section 80(1) of the *Land Registration Act* 2012, which allows for the rectification or cancellation of any registration obtained by fraud or mistake. They argued that the trial court failed to consider the evidence of fraud admitted by the 1st defendant in the lower court and uncontroverted by the respondent. They said that this would have justified the cancellation of the title to Parcel 6350.
12. The appellants claim they discharged their burden of proof under the *Evidence Act*, having demonstrated that the land transfer was done without proper procedures or consent by the appellants and other family members. The appellants further argued that the trial court should have corrected the mistake admitted by the 1st defendant regarding the transfer of the land to the respondent. The case of *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR was cited in support of their submissions.
13. The respondent on the other hand submitted that it was the 1st defendant who signed all required documents of transfer as the administrator of their late fathers estate and thus there was no case of fraud as alleged by the appellants. She further said that the administrator is still alive but the circumstances under which he ceased to be a party in the appeal are not clear and therefore the case before this court is defective. She expressed further that some of the parties in this case are now deceased and have never been substituted though no evidence of that was tendered. It was her view that this matter was a



succession matter thus defeating the jurisdiction of this court. However, the same issue of jurisdiction was determined by this court after the appeal was filed when the respondent raised a preliminary objection on the same so that's an issue that's neither here nor there. It was further submitted that the 1st defendant never made a mistake at any time and the court was asked to dismiss the appeal with costs to the respondent.

14. I have considered the appeal as filed, the party's submissions, and the lower court record in general. 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.
15. From the material before me, the clear questions for determination are;
 - a. Whether the registration of the respondent as the owner of Parcel 6350 was founded on fraud.
 - b. Whether the trial court erred in failing to cancel the title to Parcel 6350.
16. It is well established that fraud is a serious allegation, and the party making the claim based on fraud must not only plead and particularize it, but must also prove it to a higher standard than the usual standard of proof on a balance of probabilities in civil cases. This standard is still slightly lower than the criminal law threshold of beyond reasonable doubt. See the cases of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *Kinyanjui Kamau vs George Kamau* [2015] eKLR.
17. In the present case, the appellants allege that the transfer of land parcel Ngandori/Kirigi/6350 to the respondent was fraudulent. They assert that the transfer was done without their knowledge or consent and that it was facilitated by a conspiracy between the respondent and the 1st defendant in the lower court - Ephantus Njagi. The 1st defendant however, claimed that the transfer was made inadvertently, though in my view he did not provide any compelling explanation as to how such an oversight occurred, except for his suspicion that the surveyor may have colluded with the respondent. This claim of inadvertence does not necessarily amount to fraud, as fraud involves deliberate and deceitful actions aimed at securing an unfair or unlawful gain.
18. The trial court correctly noted that the burden of proving fraud lay squarely on the appellants, who alleged it. The appellants needed to prove, to a higher standard, that the respondent and the 1st defendant engaged in deliberate actions to defraud them of parcel 6350. However, from the evidence on record, the appellants did not provide sufficient proof of such fraudulent intent. Ephantus Njagi's admission that he transferred the land to the respondent, albeit claiming it was a mistake, does not in itself prove fraud. In fact, the evidence seems to insinuate that the transfer was carried out as part of an agreement between the siblings to subdivide the land. The respondent's claim that their mother had intended her to receive the portion in question is in view plausible as observed by the trial court. This is so especially given the extra responsibilities the respondent had in caring for her children and those of her deceased sisters.
19. The appellants also argued that the respondent had already received her share of the estate, and therefore should not have been allocated parcel 6350. However, this argument cannot also be said to be evidence of fraud. Moreover, there was no evidence that Ephantus Njagi as the administrator did not willingly sign the transfer documents. While it may be true that the procedural steps for distributing their late mother's share of the estate were not followed precisely, particularly in terms of substituting their mother in the succession cause before distributing her portion, this does not necessarily imply



fraud. Rather, it appears to be a case of procedural irregularity, which does not automatically warrant the cancellation of the title unless fraud or other illegality is conclusively proven.

16. For the foregoing reasons, I find that the trial court correctly found that the transfer of parcel 6350 to the respondent was not fraudulent and there is no basis to overturn that finding. The judgment and decree of the lower court is therefore upheld. The appeal is hereby dismissed.
17. Since the parties are siblings, I will not be making any orders as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 3RD OCTOBER, 2024.

In the presence of Githinji Ithiga for Njeru Ithiga for appellants, respondents present in person.

Court assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

3.10.2024

