



REPUBLIC OF KENYA



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**Kanampiu v Tiras (Environment and Land Appeal E003 of 2022)
[2023] KEELC 484 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

CK YANO, J

FEBRUARY 1, 2023

BETWEEN

TIMOTHY MICHENI KANAMPIU APPELLANT

AND

KELLEN KEERU TIRAS RESPONDENT

*(Being an appeal from the Judgement and decree of the Chief Magistrate (Hon. J. M Njoroge)
in Chuka Chief Magistrate's Court in ELC No. 118 of 2017 delivered on 26/11/2021)*

JUDGMENT

A. Introduction

1. The appellant Timothy Micheni Kanampiu filed this appeal against part of the judgement and decree of the Chief Magistrate (Hon. J.M Njoroge) delivered on November 26, 2021 and set out the following 6 grounds of appeal:
 - i. That the learned Trial magistrate erred in law and fact by finding that the sale of land L.R Nos. Mwimbi/Chogoria/2727 and 2729 to the respondent was not backed by a sale agreement whereas there was evidence of executed transfer forms and statements by members of the Land Control Board when as evidence that the two parties appeared before the board.
 - ii. That the learned trial magistrate erred in law and fact by failing to find that there were transfer forms duly signed by the respondent's deceased father and which documents were produced by the appellant and the lands registrar.
 - iii. That the learned trial magistrate erred in law and fact by awarding the respondent the two parcels of land L.R Nos. Mwimbi/Chogoria/2727 and 2729 despite there being documentary evidence that the appellant had acquired these parcels legally and was utilizing the land.



- iv. That the Learned Trial Magistrate erred in Law and fact by awarding the respondent the two parcels of land L.R Nos Mwimbi/Chogoria/2727 and 2729 by stating that the family was not involved in the transactions of the said parcels of lands while the respondent's father Tilas M'bore M'raji was the sole owner of the original land parcel No. 1591 and at liberty to dispose his property.
 - v. That the learned trial magistrate erred in failing to find that the appellant herein had been cleared of any wrong doing in relation to these parcels of land after he was charged and in Chuka Criminal case 1009/2006, with the offence of obtaining registration by false pretence contrary to section 320 of penal code, in the matter related to this land parcels but was later acquitted proving that the appellant did not obtain the four parcels fraudulently and illegally but is the rightfully owner of the said parcels L.R Nos. Mwimbi/Chogoria/2727 and 2729.
 - vi. That the Learned Trial Magistrate erred in law and fact by awarding the appellant ½ (half) the costs.
2. The Appellant prayed to this Honourable court for the orders that the appeal herein be allowed and that part of the judgement and decree in Chuka- CMCC No.118 of 2018 awarding the respondent L.R Nos. Mwimbi/Chogoria/2727 and 2729 be set aside and the two parcels be awarded to the appellant and that the costs of this appeal and the lower court be borne by the respondent.

Background of The Appeal

1. The gist of the case in a nutshell is that the Respondent's father, Tilas M'bore M'raji filed a suit *vide* a plaint dated 3rd May 2004 against the Appellant seeking for various orders. In the plaint the Respondent's father averred that they are not related with the Appellant and that the Respondent's father is the original owner of the parcel of land LR No. Mwimbi/Chogoria/1591 then measuring 0.527 Hectares prior to its subdivision on or about 24th day of September, 1999.
4. The Respondent's father further averred that on 30th day of March, 2004 he discovered that the Appellant without the authority consent or approval and with an intention to deprive the Respondent's father of the property, secretly and fraudulently dealt with the said land Mwimbi/Chogoria/1591 belonging to the Respondent's father and on or about the 24th day of September, 1999 the Appellant dealt, grabbed and without any consideration whatsoever caused the suit land to be subdivided and registered the resultant 4 parcels in his name.
5. It was averred that it is the Appellant who is currently the registered proprietor of LR Nos. Mwimbi/Chogoria/2726, 2727, 2728, 2729 and 2730 having fraudulently obtained the same. The Respondent's father averred that the Appellant's dealing with the said land was fraudulent, illegal and unlawful. The Respondent's father gave particulars of fraud allegedly committed by the Appellant.
6. The Respondent's father prayed for a declaration that the suit land Mwimbi/Chogoria/2726, 2727, 2728, 2729 and 2730 is family land and the Appellant's dealing with the same was fraudulent and illegal. The Respondent's father further prayed for a declaration that the Appellant's dealing with the suit land was in breach of the provisions of the *Registered Land Act* (Cap 300) (now repealed) and that the same should be cancelled. The Respondent's father also prayed for general damages and an order of permanent injunction to restrain the Appellant from trespassing into the suit land and for an order that the subdivision and transfer of the said parcels Mwimbi/Chogoria/2726, 2727, 2728, 2729 and 2730 by the Appellant was illegal and wrongful and the same should be cancelled and the land be transferred to him via a rectification of the appropriate land register.
7. The Respondent's father sought for judgment against the Appellant as follows: -



- a. A declaration that LR Nos Mwimbi/Chogoria/2726, 2727, 2728, 2729 and 2730 belong to the Respondent’s father and the Appellant dealing with the same was fraudulent and illegal.
 - b. An order that the Appellant to transfer LR No. Mwimbi/Chogoria/ 2726, 2727, 2728, 2729 and 2730 to the Respondent’s father and in default the Executive Officer of the court do sign all the requisite transfer documents to effect such transfer of the land to the Respondent’s father.
 - c. An order that the land Register for the said parcels be rectified by cancelling the name of the Appellant therefrom and registering the same in the Respondent’s father’s name.
 - d. Costs of the suit and interest at court rates.
8. The Appellant in his defence dated 2nd July, 2004 denied the claim and averred that the registration of the suit parcels of land were lawfully carried out with the full participation of the Respondent’s father. The Appellant denied that the registrations were fraudulent, illegal and unlawful as alleged.
9. After hearing evidence from both the Appellant and the Respondent, the subordinate court allowed the Respondent’s suit in the following terms:
- a. A declaration that L.R. Nos. Mwimbi/Chogoria/2727, 2729 and 2730 belong to the Plaintiff (Respondent).
 - b. A declaration that LR Nos. Mwimbi/Chogoria/2726 and 2728 belong to the Defendant (Appellant).
 - c. An order that the Defendant (Appellant) to transfer LR. Mwimbi/Chogoria/2727, 2729 and 2730 to the Plaintiff (Respondent) and in default the Executive Officer of the court do sign all the requisite transfer documents to effect the said transfer to the Plaintiff (Respondent).
 - d. That the Lands Register for the parcels 2727, 2729 and 2730 be cancelled in the name of the Defendant (Appellant) and replaced with the name of the Plaintiff (Respondent).
 - e. The Plaintiff (Respondent) is awarded ½ the costs.
10. In his judgment, the trial magistrate considered that the parent parcel Mwimbi/Chogoria/1591 was initially registered in the name of the Respondent’s father, the late Tilas M’Bore M’Raiji, but portions were transferred into the Appellant’s name. The trial magistrate noted that the Appellant claimed to have bought the portions of land over a long period of time. The learned magistrate however, observed that the Appellant did not reveal the time or period that the transaction took place, nor did he explain the consideration or purchase price and when and how the same was paid. The trial court further observed that the Appellant did not produce a sale agreement or reveal who the witnesses were.
11. The learned trial magistrate considered the provisions of section 3(3) of the *Law of Contract Act*, as held in *James Waitthaka Kamau and 3 others v Stanley Njoroge* (NBI) HCCC No. 6656 of 1991 thus:
- “But under section 3(3) of the *Law of Contract Act*, for any sale and purchase of land to be effective, there should be a note or memoranda in writing, giving names of the parties, the purchase price, parties signature and that of witnesses...”
12. The learned magistrate further noted that the Respondent stated that the family of their deceased father was not involved and were not aware of the said transactions and that this was ancestral land held in trust and hence was not available for sale, unless the entire family of the deceased was involved. The trial court further noted that the Appellant did not contradict the position that the deceased’s family



was involved. That the Appellant stated that they appeared before the Land Control Board and that the deceased and his wife were present.

13. The trial court noted that in their statement to the police, the members of the Land Control Board did not name the deceased's wife as having attended the Land Control Board. That it was further confirmed that the consent to subdivide was issued on the strength of a letter written by the deceased's wife, but the contents were not disclosed to the court as this was important to show how much land she was to be transferred to.
14. The trial court found that the evidence adduced supported the fact that the deceased had sought to sell two plots now portions Nos. 2726 and 2728 which are registered in the names of the Appellant. The court further found that the registration of the rest of the portions were not backed by the evidence adduced by members of the Land Control Board.
15. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 8th November, 2022 through the firm of Muthomi Gitari & Co. Advocates while the Respondent filed hers on the same date through the firm of Kiogora Ariithi & Associates Advocates.

The appellant's submissions

16. The Appellant submitted that the main issue for determination by this Honourable court is whether there was any evidence of fraud proved against the Appellant in the trial court. the Appellant submitted that the learned trial magistrate erred in law and fact by finding that the sale of land L.R. NOS. Mwimbi/Chogoria/2727 and 2729 to the Respondent was not backed by a sale agreement whereas there was evidence of executed transfer forms and statements by members of the Land Control Board showing that both parties appeared before the board. It was the Appellant's submission that he tabled evidence of executed transfer forms signed by the Respondent's father whose signatures were not disputed. That the transfer forms show the amount of money the land was sold for and that the members of the Land Control Board testified that the seller and buyer appeared before the board and the board subsequently gave its consent for the subdivisions and sale of the land to the Appellant.
17. The Appellant further submitted that the learned trial Magistrate erred in Law and fact by arriving at a finding that there were no transfer forms duly signed by the respondent's deceased father and whereas those duly executed transfer documents were produced by the appellant and the lands registrar in court. The Appellant faulted the Learned Trial Magistrate for awarding the respondent the two parcels of land L.R Nos. Mwimbi/Chogoria/2727 and 2729 by stating that the family was not involved in the transactions of the said parcels of lands while the respondent's father Tilas M'bore M'raiji was the sole owner of the original land parcel No. 1591 and at liberty to dispose his property. The Appellant submitted that fraud was not proved in the suit before the trial court.
18. The Appellant submitted that he had tabled evidence in court showing that he had been cleared of any wrong doing and acquitted in relation to the suit parcels of land after he was charged in Chuka Criminal Case 1009/2006, with the offence of obtaining registration by false pretence contrary to section 320 of [penal code](#), and that that proved that the appellant did not obtain the four parcels fraudulently and illegally but is the rightful owner of the said parcels L.R Nos. Mwimbi/Chogoria/2727 and 2729.



19. The Appellant’s counsel relied on the case of *Rg Patel v Lalji Makanji* (1957) EA 314 in which the court expressed itself as follows:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”
20. The Appellant also relied on the case of *Jennifer Nyambura Kamau v Humphrey Nandi*: (2013) eKLR, where the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that the standard of proof is beyond a balance of probabilities.
21. Further, the Appellant relied on the case of *Benson Wandera Okuku v Israel Were Wakbo* [2020] eKLR in which the learned Justice A.K.Kaniaru in dismissing the plaintiff’s case held that:
- “Overall, the position that emerges is that evidence of especially high quality and strength is required to prove fraud in civil matters. It is a daunting and burdensome task to prove fraud in any civil case. The plaintiff in this case seemed not to appreciate this well when he set about the task of prosecuting his case. 18. The upshot, in light of the foregoing, is that the plaintiff did not discharge well the burden of proving fraud in this case. Yet it is a case which, as conceived and framed, is founded on the tort of fraud. I therefore hold that the plaintiff’s case is not proved to the standard set by law”.
22. The Appellant submitted that the threshold of proving fraud was not met during the trial of this matter and that the trial magistrate erred in arriving at his decision.

The Respondent’s Submissions

23. The Respondent submitted that the Appellant did not adduce any evidence to support his allegation that he ever bought any land from the respondent’s deceased father and that the appellant was not able to produce any agreement for sale of land as required by the law as demonstrated by the respondent and her witnesses and that Section 3(3) of The *Law of contract* is therefore applicable, hence there is no evidence to demonstrate that there was any sale of land between the appellant and the respondent’s late father.
24. The Respondent argued that there was no error on the part of the Learned Trial Magistrate when he found that the appellant did not buy L.R NO. s Mwimbi/Chogoria/2727, 2729 and 2730 from the respondent’s father.
25. The respondent submitted that the trial court erred by awarding the appellant the two parcels of land as the appellant did not file any counterclaim in court and was bound by his pleadings.
26. The respondent’s counsel relied on the holding by the Court of Appeal in the case of *John Olorashar Ole Ngiru v Ocboba Bidundu & James Ogahi* CA No.87 of 2019 Kisumu and urged the court to reject ground 1 of the appeal.
27. On Ground 2 of the Appeal, the respondent stated that as submitted before the lower court, the appellant did not produce any application to the Land Control Board, the consent from the land Control Board and transfer of land form. The respondent further submitted that the land registrar (DW2) during cross examination inter alia told the court that she had no consent to transfer the 5(five) parcels of land.



28. It is the respondent submission that the acquisition of the suit properties by the appellant was not backed by any evidence from the land Control Board and that pursuant to the Provisions of Section 6 of the *Land Control Act* the alleged transaction between the respondent's deceased father and the appellant, if any, was and is therefore a nullity in law. The Respondent argued that that ground of appeal is erroneous for alleging that the transfer forms were produced by the Land Registrar when she did not produce such documents, and urged the court to adopt the holding by The Court of Appeal in the case of *Peter Waweru Waititu v Cyrus J. Karanja* Ca No.257 of 2001 and find that the appellant did not buy any land from the respondent's deceased father. The respondent prayed that ground two of the appeal be disallowed as it does not reflect the court record.
29. On ground 3 of the Appeal, the Respondent submitted that as submitted before the lower Court, the appellant did not produce any transfer form duly signed by the respondent's deceased father and that there was no sale of any land to the appellant and urged the court to disallow the said ground.
30. Regarding ground 4 of the appeal, the Respondent submitted that the appellant obtained the parcels of land through fraudulent means, hence it was not correct for the trial court to find that the respondent was entitled to the 2 parcels of land, the court having found that the appellant ought to return the other three parcels of land to the Respondent. The Respondent urged the court to disallow the said ground of appeal and affirm the award of parcel of land L.R. Nos. Mwimbi/Chogoria/2727, 2729 and 2730 to the Respondent.
31. On ground 5 of the appeal, the Respondent submitted that the Appellant did not file any counterclaim with respect to the parcels of land and as such there was no basis to award any parcel of land to the appellant because there was no prayer for the award of the land. The Respondent further submitted that the court in criminal case No.1009 of 2006 did not award the appellant any land at all and did not find that he was the rightful owner of the land. It is the respondent submission that the acquittal of the appellant is not a ground or basis for him to claim any land from the respondent's father.
32. Regarding ground 6 of the appeal, the Respondent submitted that the lower court having entered judgment in favour of the appellant over the other three parcels of land and the appellant having failed to file any counterclaim, the court should find that the respondent was entitled to get full costs of the suit as costs follow the event and that there were no compelling reasons to deny the successful party costs of the suit. It was further submitted that the appellant was not entitled to any costs.
33. The Respondent submitted that the appeal herein has no merits and prayed that the same be dismissed and prayed that part of the judgment and decree in Chuka –CMCC NO.118 of 2018 awarding the respondent part of the land L.R. Nos. Mwimbi/Chogoria/2726 and 2728 be set aside and the two parcels be awarded to the appellant (sic), and that the award of the parcels of land LR. Nos. Mwimbi/Chogoria/2727, 2729 and 2730 to the Respondent be affirmed.
34. The Respondent also prayed that the costs of this appeal and of the lower court be borne by the Appellant.

Analysis And Determination

35. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The court has also taken judicial notice that there was a related matter Chuka ELC Appeal Case No. E016 of



2021 between the same parties herein and arising from the same case. The Respondent herein was the Appellant in that other appeal while the Appellant was the Respondent.

36. There are only two issues I find for my consideration; - whether there was any evidence of fraud proved against the Appellant in the trial court and the issue of costs.
37. With regard to the first issue, the Appellant has submitted that the threshold of proving fraud was not met during the trial of this matter before the subordinate court. the Appellant further submitted that he tabled evidence before the trial court showing that he had been cleared of any wrong doing in relation to the suit parcels of land after he was charged and acquitted in Chuka Criminal Case No. 1009 of 2006 with the offence of obtaining registration by false pretence contrary to section 320 of the *Penal Code*. That the acquittal proved that the Appellant did not obtain the four parcels of land fraudulently and illegally.
38. As rightly submitted by the Appellant, allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, but something more than a mere balance of probabilities is required. General accusations are not sufficient to prove fraud.
39. In this case, the Respondent has pleaded fraud against the Appellant. As stated above, it is trite law that any allegations of fraud must be pleaded and strictly proved. In the case of *Ndolo v Ndolo* (2008) 1 KLR 742, the court stated:
- “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that 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; in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
40. In the case of *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 Others* [2013] eKLR the Court of Appeal held that:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The Appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.”
41. In *Central Bank of Kenya v Trust Bank Limited & 4 Others* [1996] eKLR, proof of fraud was held as being beyond that of a balance of probabilities. In that case, the Court of Appeal rendered itself as follows:
- “The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in the ordinary Civil case.”
42. In addition, section 107 of the *Evidence Act* states as follows:
- Burden of proof



“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts.”

43. The law also states at section 108 of the Evidence Act (Cap 80 of the Laws of Kenya) that:-

Incidence of Burden

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

44. Lastly as a warning to a litigant, section 109 of the same Act states as follows:

“The burden of proof as to any fact lies on the person who wishes the court to believe it’s existence, unless it is provided by any law that the proof of that fact lies on any particular person.”

45. In this case, the Respondent pleaded fraud against the Appellant who vehemently denied the alleged fraud. All that the Respondent stated in their evidence, and which the trial court heavily relied on in its judgment, is that the family of the deceased was not involved and were kept in the dark of the transactions.

46. The court has carefully perused the record. The Appellant’s evidence was that he was sold the parcel Nos. Mwimbi/Chogoria/2726, 2727, 2728, 2729 and 2730 by the Respondent’s deceased father. It is not disputed that the deceased had sold parcel Nos. 2726 and 2728 to the Appellant. The Appellant has titles for all the parcels Nos. 2726, 2727, 2728, 2729 and 2730.

47. In the case of Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 Others Nairobi Civil Appeal No. 60 of 1997, the court categorically declared that:-

“section 23(1) of the then Registration of Titles Act (now reproduced substantially as section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is sanctity of title bestowed upon the title holder under the Act. It is our law and law take precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

48. Section 26 of the Lad Registration Act is also categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the certificate of title has been acquired fraudulently, unprocedurally or through a corrupt scheme.

49. In this case, the record indicates that the Appellant was charged with a Criminal Case for obtaining registration of the suit parcels by false pretence. However, the record further confirms that the Appellant was acquitted and there is no evidence that there was any appeal preferred, and therefore the acquittal still stands. Again, from the evidence on record, the Respondent’s mother is said to have stated in her statement that the Respondent’s deceased father sold land to the Appellant. The same was confirmed by the area Assistant Chief who stated that the Respondent’s parents and the Appellant appeared in his office and confirmed that the deceased had sold the land to the Appellant and that they were given a letter to proceed to the Land Control Board, Chuka. From the evidence on record, it is also recorded that one Murithi M’Ragwa confirmed that the parties appeared before the Land Control Board. Of course the Respondent stated that he did not agree with this evidence. However,



the question that arises is whether the Respondent had proved that there was fraud in light of the said evidence? In my view, the answer to this question is in the negative.

50. Whereas the Respondent testified that she did not see a sale agreement between the deceased and the appellant, the evidence on record confirms that the deceased had sold parcels of land to the Appellant. The suit parcels of land were registered in the name of the Appellant and the certificates of titles are to be taken by the court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per section 26 of the [Land Registration Act](#). The Land Registrar (Sharon Muthoni Gitau) who testified as DW1 confirmed that the five parcels of land were transferred by the Respondent's deceased father. The trial court recorded that the said Land Registrar produced documents to show that land parcel No. 1591 was subdivided into 5 parcels and that the transfer was done by the deceased. In my view, the Appellant had discharged the burden to prove that he acquired the suit parcels from the deceased and the onus was on the Respondent to prove that the acquisition was fraudulent.
51. In this case, I am not satisfied that the threshold of proving fraud was met by the Respondent during the trial of the matter and the trial magistrate no doubt erred in arriving at his decision. To succeed in a claim of fraud, the Respondent not only needed to plead but also to adduce watertight evidence upon which the court would make its finding. It is settled law that fraud is a very serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. In my view, the Respondent never proved the alleged fraud to the standard required. In those circumstances, it is the finding of this court that the learned trial magistrate reached wrong conclusions in arriving at his decision. In my view, the decision of the trial court was not backed by evidence and the law, and therefore must be set aside.

Issue of Costs

52. On the award of half (½) costs to the Respondent, ordinarily costs normally follow the event. Section 27 of the [Civil Procedure Act](#) provides that costs are awarded at the discretion of the court. In this case, since the Appellant is the successful party, I see no reason why he should not be awarded the costs both in this appeal and in the suit before the subordinate court.
53. In the result, I find merit in the Appellant's appeal and I make the following orders:
- a. The appeal is hereby allowed.
 - b. The Judgment of the trial court in Chuka CMC ELC No. 118 of 2017 is set aside and substituted with an order that the Respondent's suit is dismissed.
 - c. Costs of this appeal and of the lower court are awarded to the Appellant.
54. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF FEBRUARY, 2023

IN THE PRESENCE OF:

CA: Martha

No appearance for Appellant

No appearance for Respondent

C.K. YANO,

JUDGE.

