Kirimojo & 2 others v Njuguna (Environment and Land Appeal E007 of 2021) [2023] KEELC 16316 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16316 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL E007 OF 2021

BN OLAO, J

MARCH 14, 2023

BETWEEN

ISAAC WANYONYI KIRIMOJO ..... 1ST APPELLANT

CALEB WANJALA KIRIMOJO ..... 2ND APPELLANT

DAVID WAFULA KIRIMOJO ..... 3RD APPELLANT

AND

CHARLES MBURU NJUGUNA ..... RESPONDENT

(Being an appeal from the judgement and decree of HON. G. Adhiambo Principal Magistrate – Kimilili Court delivered on 13th May 2021 in Kimilili Principal Magistrate's Court Elc Case No. 12 of 2018)

JUDGMENT

1. Charles Mburu Njuguna (the Respondent herein) first moved the High Court At Bungoma vide a plaint dated 9th July 2012 and filed on 12th July 2012. He impleaded Isaac Wanyonyi Kirimocho, Caleb Wanjala Kirimocho and Daudi Kirimocho aka David Wafula Kirimocho (the Appellants herein) seeking judgment against them jointly and severally in the following terms in relation to the plot NO 1(A) Kimilili D Market (the suit plot):

    1. A declaration that the Appellants are trespassing onto the suit plot belonging to the Respondent.

    2. An order compelling the Appellants to stop the offending acts and remove their timber kiosk, from the Respondent's plot.

    3. General damages for trespass.

4. An order of permanent injunction barring the Appellants whether by themselves or by their servants and/or agents from encroaching and interfering with the Respondent's plot and his quiet possession of the same.

5. Costs of the suit and interest.

6. Any further relief as the Honourable Court may deem appropriate.

The Respondent's case was that infact he purchased the suit plot from the Appellants' late father one Peter Danstan Kirimojo and one Joseph Kirimojo in 1991.

2. The Appellants filed a joint statement of defence in which they denied having trespassed into the Respondent's land. They pleaded that infact they are in occupation of their late father's plot being plot No 1D Kimilili and denied having trespassed into the suit plot adding that the purported sale agreement between the Respondent and their late father with respect to the suit plot was a forgery. The Appellants also counter-claimed seeking the eviction of the Respondent from the suit plot on the ground that he had obtained it fraudulently particulars whereof were pleaded in paragraph 11. They therefore sought the dismissal of the Respondent's claim and urged the Court to award them general and special damages at Kshs.20,000 per month for 27 years.

3. The suit was later transferred to the subordinate Court at Kimilili where it was heard by Hon. G. Adhiambo – Principal Magistrate (as she then was).

4. Having heard the parties and their witnesses and considering also the submissions filed, the trial magistrate found no merit in the Appellant's counter claim which she ruled was statute barred and the allegations of fraud levelled against the Respondent had not been proved. She dismissed the counter-claim and instead entered judgment for the Respondents in the following terms:

1. A declaration that the Appellants had unlawfully occupied the suit plot and are trespassers thereon.

2. An order or permanent injunction barring the Appellants whether by themselves or their servants and/or agents from encroaching on or interfering with the Respondent's plot.

3. An order that the Appellants remove their timber kiosks from the suit plot and further refrain from engaging in offending acts on the said plot.

4. The Appellants do jointly pay the Respondent general damages of Kshs.100,000.00 for the trespass into the Respondent's property.

5. The Appellants to pay costs of the suit and interest on the general damages at Court rates.

5. Aggrieved by that judgment, the Appellants filed this appeal on 21st May 2021 seeking to set aside the above orders. The Appellants who are acting in person put forward the following twenty six (26) grounds of appeal:

1. That the Honourable learned Magistrate erred in law and fact in failing to find that the Appellants indeed through their pleadings vide their amended joint statement of defence and their counter-claim filed with the leave of the Court granted to them by HON. D. O. Onyango SPM Kimilili demonstrated that they are in their late father Peter Danstan Kirimojo's land plot 1 'D' Kimilili which is a portion thereof in the land parcel No Kimilili/Kimilili/875 which the 3rd Appellant is the legal Administrator and had not trespassed onto the Respondent's land as alleged.

2. That the learned Magistrate erred in law and in fact in failing to find that among the Respondent had five (5) forged agreements by which he purported to have bought the Appellants' plot.

3. That the learned Magistrate erred in law and in fact in failing to find that among the Respondent's forged five (5) agreements, the two (2) agreements one dated 18th November 1991 and the other dated 22nd November 1991 identified by the rubber stamps of D.O. Moronge & Co. Advocates and which signatures appear suspicious were forged agreements which the Law Society of Kenya denied having any such advocate with a practising licence at the date which the agreements were signed as per the Law Society's letter dated 4th September 2013 on record of the Court.

4. That the learned Magistrate erred in law and fact in failing to find that the Respondent's plot 1 'A' Kimilili 'D' Market purported thereof is a portion in the plot NO 1 'D' Kimilili which is part of the land parcel NO Kimilili/Kimilili/875 belonging to the family of the Appellants and which the 3rd Appellant is the Legal Administrator vide the confirmed Grant in Bungoma High Court Succession Cause No 158 of 2020.

5. That the learned Magistrate erred in law and fact in failing to find that the Ministry of Public Health and Sanitation letter dated 26th June 2012 which led to a controversial dispute between the Appellants and the Respondent and which culminated in this suit was addressed to the 1st Appellant whose land belonged to the family of the Appellants of which the 3rd Appellant is the Legal Administrator.

6. That the learned Magistrate erred in law and fact in failing to find that the genesis of the fraud on the part of the Respondent originated from the two (2) purported hand written agreements both dated 23rd June 1991 but which indicated different parcels of land but one showed the land erased from the agreement thus a clear indication of forgery to defraud the Appellants of their land.

7. That the learned Magistrate erred in law and fact in failing to find that the plot purportedly having been purchased by the Respondent is a portion thereof in plot No 1 'D' Kimililiwhich is part of the land parcel No Kimilili/Kimilili/875 and which was surrendered back to the family of the Appellants vide Bungoma County Councilletter dated 8th June 1994 and therefore the Respondent's purported Kimilili Town Council letter dated 30th November 1994 is a forged document to defraud the Appellants of their plot and therefore wrongly taken as the evidence of which the judgment was based.

8. That the learned Magistrate erred in law and fact in failing to find and compare the contents of the two letters i.e. Appellants' Bungoma County Councilletter dated 8th June 1994 and the Respondent's Kimilili Town Council letter dated 30th December 1994.

9. That the learned Magistrate erred in law and fact in failing to find that the Respondent did not file and/or show the Court any plot rate receipts for the money remitted by himself to the County Government of Bungomaand the County Council Of Bungoma in the former regime as factored in the judgment.

10. That the learned Magistrate erred in law and fact in failing to find that there was no survey report filed in Court by the Respondent to show whether the respondent's purported plot is separate from the Appellants' plot 1 'D'Kimilili.

11. That the learned Magistrate erred in law and fact in failing to find that the respondent did not file any minutes to support the purported Kimilili Town Council letter dated 20th December 1994 and further failed to find that the purported letter is not on the letter head and hence not official.

12. That the learned Magistrate erred in law and fact in failing to find that the plot rates receipts appearing on the Respondent's list of documents belonging to the deceased grandfather of the Appellants Andrea Kirimoja Wakimoko.

13. That the learned Magistrate erred in law and fact in failing to find that the Respondent's purported letter dated 1959 referring to Kimililias a Districtis a false, fake and forged document created by the Respondent asKimilili was a location by then and the District was Elgon Nyanzaof which the office of the District Commissioner was inKisumu.

14. That the learned Magistrate erred in law and fact in failing to find that the former regime under the old Constitution had a history of land injustices which Government agencies through proxies and like-minded brokers grabbed peoples' land and eventually such grabbed land was factored as compulsorily acquired but the real owners were not paid compensation as required by law and which the land reforms in the new Constitutional dispensation of 2010 provided for solutions to the said land injustices.

15. That the learned Magistrate erred in law and fact in failing to find that the land plot NO 1 'D' Kimililia portion thereof in the land parcel No Kimilili/Kimilili/875 was the property of the Appellants' father Peter Danstan Kirimojoas the same was transferred vide receipt NO 384833 dated 28th March 1990 by Andrea Kirimojo Wakimoko to his son Peter Danstan Kirimojo when he was still alive and therefore the issue of sale of a plot by Joseph Simiyu Kirimojo cannot feature in the circumstances concerning the Appellants' land in the case appealed thereto and thus the purported letter dated 19th June 2009 and a witness statement said to be from the late Joseph Simiyu Kirimojo are not genuine as the same were forged at a critical time when Peter Danstan Kirimojo was dead and the Appellants were in the process of succession of their late father's Estate.

16. That the learned Magistrate erred in law and fact in failing to find that there is no evidence of compensation to the family of the Appellants over the land/plot which is a basis of the suit.

17. That the learned Magistrate erred in law and fact in failing to find that the Government land ought to be utilized for projects which are a public interest and not private individuals carrying on their own private business for profit making on pretence that they are land rates.

18. That the learned Magistrate erred in law and fact in failing to find that the Appellants discovered the fraud of the Respondent on their father's land after the Respondent sued the appellant and as a result, the Respondent's agreements were put in public domain after they were filed in court and that is how the Appellants became aware of the fraud by the Respondent.

19. That the learned Magistrate erred in law and fact in failing to find that the Appellants' amended defence and counter-claim was filed with the leave of the Court granted to the Appellants in open Court by Hon. D. O. Onyango Senior Principal Magistrate Kimililiand even exparte judgment was handed down in favour of the Appellants for failure of the Respondent to file defence to counter claim within the prescribed time in law.

20. That the learned Magistrate erred in law and fact in failing to find that when the matter was in the Environment and Land Court at Bungomabefore Justice S. N. Mukunya,the interlocutory judgment was entered in favour of the Appellants shortly before the respondent applied to set aside the said judgment and transfer of the file toKimilili.

21. That the learned Magistrate erred in law and fact in deciding against the weight of the evidence on record.

22. That the learned Magistrate erred in law and fact by only considering the evidence of the Respondents and failing to consider the appellants' explanation and evidence on record.

23. That the learned Magistrate erred in law and fact in failing to find that the Appellants never transacted nor signed any land sale agreement with the respondent whatsoever.

24. That the learned Magistrate erred in law and fact in failing to find that the plot purportedly purchased by the Respondent is graveyard of the appellants grandparents buried there which traditionally and/or as per the African customs/cultural practice, the Appellants cannot sell a graveyard.

25. That the learned Magistrate erred in law and fact in failing to find that the respondent unlawfully trespassed into the Appellants grave yard plot and unlawfully and fraudulently occupied and did business in the Appellants' timber structure which was built by the Appellants' late father Peter Danstan Kirimojo.

26. That the learned Magistrate erred in law and fact in taking into account the extraneous matters and evidence in reaching the decision in favour of the Respondent without considering the weight of the Appellants' evidence.

6. The appeal has been canvased by way of written submissions. These have been filed by the Appellants acting in person and by MR J. Khakula instructed by the firm of J. S. Khakula & Company Advocates of the Respondent.

7. I have considered the memorandum of appeal, the record of appeal and the submissions.

8. This being a first appeal, my duty is to re-consider and re-evaluate the evidence on record and draw my own conclusions. In doing so, I must remember that unlike the trial court, I neither saw nor heard the witnesses. I should therefore give due allowance for that and give my reasons for the decision I arrive at. In the case of *Peters v Sunday Post Ltd* 1958 E.A 424, the Court stated the following with regard to the duty of a first appellant court:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; If there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances committed or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."
>
> A first appeal is therefore in the nature of a re-trial.

9. Before I delve into the appeal itself, I must comment on the memorandum of appeal which contains a whopping 26 grounds of appeal some of which are too verbose, repetitive and appear to be a regurgitation of the trial itself. I am of course alive to the fact that the Appellants are pro-se litigants.

Nonetheless, it is worth repeating what the Court of appeal stated in the case of *William Koross -v- Hezekiah Kiptoo Komen & 4 others* 2015 eKLR:

> " The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and it will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

Take, for example, ground no 15 of the memorandum of appeal which I need not repeat for fear of committing the same error which the appellants are guilty of. Surely, that ground of appeal could have been made more concise. As a court, however, I must take the litigants before me in the form in which they are. For purposes of brevity and conciseness, I will collapse these grounds.

10. In grounds Nos 19 and 20, the Appellants assail the trial Magistrate for failing to find that the Appellants already had an interlocutory judgment entered in their favour both by Mukunya J and also by D. O. Onyango Senior Principal Magistrate. I have looked at the record and while I could not trace any interlocutory judgment entered by Mukunya J in favour of the Appellants with respect to their counter-claim, I notice however that on 12th September 2018, the Appellants requested for the entry of judgment in their favour in respect of their counter-claim. They also sought that their counter-claim be listed for formal proof. That interlocutory judgment was entered by HON. D. Onyango Senior Principal Magistrate on 14th September 2018. However, following an application by the Respondent, the said judgment was set aside vide a ruling delivered by Hon. D. Onyango on 28th March 2019. And with regard to the interlocutory judgment (if any) that had been entered in their favour by Mukunya J, the Appellants have themselves stated in paragraph 20 of their memorandum of appeal that "the Respondent applied to set aside the said judgment and transfer of the file to Kimilili." That can only mean that the only interlocutory judgment herein was the one entered when the matter was in the subordinate court. In any event, it is never the duty of a judge to enter interlocutory judgments. Therefore, the insinuation in those grounds of appeal that the Appellants' counter-claim was ignored cannot be correct. Indeed it is clear from the impugned judgment that Hon. G. Adhiambo considered their counter-claim before dismissing it. At page 33 of the typed judgment in the record of appeal, she said:

> " The defendants have made allegations which they have failed to prove. They have failed to prove their counter-claim."

The appellants' counter-claim was therefore considered and found not to have been proved. Grounds No 19 and 20 are therefore dismissed.

11. In grounds No 14, 16 and 17, the Appellants take issue with the trial Magistrate for not making a finding that the suit land was infact grabbed by the Government and compulsorily acquired for private purposes without compensation.

12. The dispute between the parties herein was basically one of the trespass to property. It did not involve compulsory acquisition of any property by the Government. Indeed neither the Government nor any of it's agencies were parties in the dispute. It is therefore not clear why the Appellants have raised issues of compulsory acquisition and compensation of land alleged to have been "grabbed". This Court can only conclude that the Appellants were only being mischievous in raising these grounds which are dismissed.

13. Grounds No 21, 22, 23 and 26 can also be considered together. The trial Magistrate is faulted for not considering the Appellants' case, arriving at a decision which was against the weight of the evidence and in failing to find that the Appellants' did not sign any sale agreement with the Respondent.

14. The Respondent's case was that he purchased the suit plot from the Appellants' father Peter Danstan Kirimojo and his brother Joseph Kirimojo in 1991. A sale agreement dated November 22, 1991 was among the documents which the Respondent produced as part of his documentary evidence. There was also another agreement dated 23rd June 1991 between the two brothers and the Respondent duly executed by the two brothers as vendors and the Respondent as the purchaser of the said plot. The Respondent called as his witness Reverend David Malanda (DW2) who testified that he witnessed and signed the sale agreement dated 23rd June 1991. The trial Magistrate did not accept, and rightly so in my view, the suggestion that the Respondent had no right to the suit plot which the Appellants claim was the property of their deceased father as per paragraph 5A of their amended defence. In support of their counter-claim, the Appellants made reference to a letter dated 8th June 1994 to support their claim. That letter authored by the Clerk To Council Bungoma County Council and dated 8th June 1994 is addressed to the deceased Peter Danstan Kirimojo and is in reference to the land parcel No Kimilili/Kimilili/875. And after confirming that the said parcel originally belonged to Andrew Kirimojo Wakimoko, the letter goes on to add in paragraphs 3 and 4 as follows:

> " Therefore, I allow a sub-division of a new number to 1.5 acres from the parcel of land Kimilili/Kimilili/875.
>
> In County Council's record, Andrew Kirimojo Wakimoko transferred the above parcel of land and building to Peter Danstan Kirimojo of ID No. 2076229/65 in 1988. Our official receipt was given to him on 28th March 1990 – L384833. For more information, please call to my office during working hours, on any working day.
>
> Yours faithfully
>
> Joseph Martin Khisa
>
> Clerk To Council
>
> Bungoma County Council."

15. The Appellants also produced the Certificate of Rectification of Grant issued by Ali-aroni J (as she then was) on 2nd February 2017 which lists plot No Kimilili/kimilili/875 as having been transmitted to David Wafula Kirimojo the 3rd Appellant herein. That Grant was issued in respect to the Estate of Peter Danstan Kirimojo vide Bungoma High Court Succession Cause No 158 of 2010. The fact of the matter however is that by 2nd February 2017 when that Grant was rectified, the suit plot was no longer part of the Estate of Peter Danstan Kirimojo. He had not only sold it to the Respondent 26 years earlier but further, there was no evidence to suggest that he (Peter Danstan Kirimojo) had ever attempted to claim it back or evict the Respondent therefrom. The Respondent had no business signing any sale agreement with any of the Appellants because the suit plot did not belong to them. The trial Magistrate did not accept the Appellant's claim that the suit plot and the land parcel No Kimilili/Kimilili/875 were one and the same property. Even if they were, the Appellants were obliged during the succession process to disclose that the suit plot had long been sold to the Respondent and was no part of the Estate of Peter Danstan Kirimojo.

16. Most importantly however, the Appellants' claim was bound to fail because it was statute barred. In paragraph 11 of their counter-claim, the Appellants pleaded thus:

> " The defendants aver that in a period of five (5) months between June and November 1991, the plaintiff forged five (5) agreements which he purport to have bought 1 plot from their land Kimilili 1-D registered as Kimilili/Kimilili/875 of which he is unlawfully and fraudulently by use of forged agreements has encroached and doing business on it thus occasioning the defendants irreparable loss and damage."

It was therefore the Appellants' case, to use their own words in paragraph 14 of their memorandum of appeal, that the Respondent aided by Government agencies and other like minded brokers, "grabbed" the suit plot from their late father Peter Danstan Kirimojo. That cause of action having arisen in 1991 became statute barred after 12 years because Section 7 of the *Limitation of Actions Act* provides:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

Any claim that the Appellants' late father had in the suit plot was extinguished in 2003. Therefore, by the time the Appellants filed their counter-claim in 2018 seeking damages from the Respondent for the use of the suit plot, they were chasing a mirage. It is not correct for the Appellants to allege, as they have done in their appeal, that the trial Magistrate did not consider their case or that she arrived at a decision against the weight of the evidence. My perusal of the impugned judgment discloses otherwise. Indeed on the issue of limitation of the Appellant's counter-claim, this is how she addressed it at page 30:

> " Since the defendants are not disputing that the plaintiff occupied the suit property in 1991 and while noting that the counter-claim was filed in Court was filed in Court on 28/8/2019 it means that the defendants brought up their counter-claim after the lapse of 27 years. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort (sic) must not be brought after the end of three years from the date on which the cause of action occurred, provided that an action for libel or slander may not be brought after the end of twelve months from such date. Further, Section 7 of the L*imitation of Action Act* provides for actions to recover land and it provides that an action means (sic) not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person."

At page 31 of the said judgment, the trial Magistrate adds that:

> " The counter claim by the defendants is evidently time barred and was (sic) been brought out of time without the leave of Court. The said counter-claim consisted of allegations which were not proved."

Clearly therefore, the trial Magistrate considered the Appellants' case and found it un-proved. From my own re-evaluation of the evidence which was before her, that conclusion was inevitable and cannot be faulted.

17. Ground No 21, 22, 23 and 26 must also be dismissed.

18. Finally, grounds No 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 18, 20, 24 and 25 have been collapsed together. Therein, the Appellants' assail the trial Magistrate for failing to find that the sale agreements in relation to the suit plot, the various letters, receipts and other documents including the signature and

rubber stamp of the firm of D. Moronge & Company Advocates which appear on the sale agreement dated 22nd November 1991 were all forgeries. Having pleaded fraud, the burden was on the Appellants to prove that the Respondent forged those documents. Sections 107, 108 and 109 of the *Evidence Act* provide that:

107 (1): "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 that those facts exist.

(2): When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108: 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.

109: The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

In *Vijay Morjaria v Nansingh Madhusing Darbar & another* 2000 Eklr, Tunoi J.A stated that:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." Emphasis mine.

As regards the standard of proof, the Court of Appeal expressed its as follows in the case of Kinyanjui Kamau v George Kamau 2015 eKLR:

> " ... it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo 2008 1 KLR (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 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." Emphasis mine.

19. The Appellants pleaded various allegations of fraud on the part of the respondent in paragraph 11 (a) to (e) of their counter claim in the manner in which he obtained ownership of the suit plot. The Respondent filed a reply to the defence and defence to the counter-claim in which he denied the allegations of fraud levelled against him. He denied having forged any documents including the sale agreement executed by D. Moronge & Company Advocatesadding that the said advocate had since passed away.

20. The onus was therefore upon the Appellants, who sought to rely on fraud and forgery of documents on the part of the Respondent, to prove to the Court that those documents were indeed forged. The trial Magistrate considered the evidence before her and came to the conclusion that the Appellants had not discharged that burden and had only made mere allegations. This is how the trial Magistrate addressed that issue at page 25 of her judgment as contained in the record of appeal:

> " The defendant has (sic) that their father Peter Dunston Kirimojo never sold the suit property to the plaintiff and they allege that the plaintiff forged the dale agreements he presented before the Court .... as prove (sic) that he lawfully acquired the suit property having

purchased a portion of it from Joseph Simiyu Kirimojo and another portion from Peter Dunston Kirimojo. The allegations remained as mere allegations as no tangible evidence was adduced by the defendants to prove that indeed the sale agreements were forged. The defendants just made allegations and expected the Court to believe on those allegations. If indeed these was a forgery as they alleged, how comes no complaint was lodged at the nearest police station and no evidence of forgery of signatures was adduced before a Court of competent jurisdiction."

Having re-evaluated the evidence tendered by the Appellants in support of their counter-claim, I am not persuaded that the trial Magistrate erred in law or in fact in arriving at that finding. As is now clear from the precedents cited above, the onus was on the Appellants to prove the allegations, of fraud and forgery as pleaded in their counter-claim. However, the evidence adduced fell short of the proof required. For instance, with regard to their claim in paragraph 6A of their counter-claim that there was no firm of Advocates known as M/S D. Moronge & Company Advocates, the Law Society of Kenya wrote to them vide their letter dated 4th September 2013 confirming that there was indeed an Advocate by the name Dominic Moronge practising under the name of Moronge & Company Advocates. The Appellants claimed that D. Moronge was a magistrate at Kimilili Court. The duty was on the Appellants to lead congent evidence to prove that the D. Moronge who was a Magistrate at Kimilili was the same D. Moronge Advocate who witnessed the sale agreement dated November 22, 1991 especially after the Law Society of Kenya had confirmed that they had an advocate by the name Dominic Moronge in their records. In any event, the Appellants were not parties to that sale agreement and their late father Peter Danstan Kirimojo who executed it never during his life time complained that it was a forgery. In the circumstances, the trial Magistrate cannot be faulted for finding, as she did, that the Appellants' claims that the sale agreements were forged were just mere allegations.

21. With regard to the damages of Kshs.100,000 which the trial Magistrate awarded in addition to the other remedies, I see no reason to interfere with them. In any event, the appellants did not complain about that award. In *Bhutt v Khan* 1982 – 88 KAR, the Court said:

> " An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some materials respect, and in so doing arrived at a figure which was either inordinately high or low."

22. I see no reason to interfere with the trial Magistrate's discretion in that respect.

23. The up-shot is that this court finds no merit in the appeal. The same is hereby dismissed. The appellants shall jointly and severally meet the respondent's costs both here and in the court below.

BOAZ N. OLAO

JUDGE

14TH MARCH 2023

Judgment dated, signed and delivered on this 14th day of March 2023 at BUSIA ELC by way of electronic mail and with notice to the parties.

BOAZ N. OLAO

JUDGE

14TH MARCH 2023