



**Murithi & another v Mberia (Environment and Land Appeal
E098 of 2021) [2023] KEELC 16140 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E098 OF 2021**

**CK YANO, J
MARCH 15, 2023**

BETWEEN

ROSE MAKANDI MURITHI 1ST APPELLANT

GRACE NTINYARI 2ND APPELLANT

AND

JOSEPH KARITHI MBERIA RESPONDENT

*(Being an appeal from the decision/ Judgement of Honourable D.W Nyambu
(C.M) at Meru in ELC No. 127 of 2019 delivered on 18th August, 2021)*

JUDGMENT

A. Introduction

1. The appellants, Rose Makandi Murithi & Joseph Karithi Mberia, filed this appeal against the whole of the decision/Judgement of the Chief Magistrate’s court at Meru (Hon D. W Nyambu) delivered on the 18th August, 2021 in Meru ELC No. 127 of 2019 and set out the following 8 grounds of appeal:
 1. The learned trial magistrate erred in law and fact by admitting extraneous documents such as the sale of land agreement that was never produced during the hearing in the lower court.
 2. The learned trial magistrate erred in law and in fact awarding the Respondent Land Parcel No. 10953 and 10954 Ruiriri/Rwarera Adjudication Section while he was not a party to the objection proceedings.
 3. The Learned Trial Magistrate erred in law and fact in arriving at a decision that amounted to judicial review of the decision of the District Land Adjudication and Settlement Officer or Appeal to the Minister.



4. The Learned trial magistrate erred in Law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case especially affidavit sworn by Julius Kairemia on 7th July 2020, objection proceedings and as a result, she arrived at an erroneous decision;
 5. The learned magistrate erred in Law and fact by disinheriting the lawful beneficiaries and awarding almost the entire estate to the respondent who was never a party to the adjudication objection while disregarding the Appellants.
 6. The Learned Trial Magistrate erred in Law and fact by taking into account irrelevant and extraneous factors for example allegations of fraud and threat by the appellants on the respondent yet there were no charges preferred upon them hence she arrived to an erroneous verdict:
 7. The learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the submissions of the counsel for the Appellant and misdirected herself as to the law and facts applicable in reaching her decision.
 8. The learned trial magistrate was out rightly biased by ignoring and or failing to consider at all the submissions and evidence adduced by the appellant herein in her judgement.
2. The Appellant prayed for the judgement in Meru CMELC no. 127 of 2019 delivered on 18th August, 2021 be set aside and be substituted with an order allowing the appellants suit as prayed, the respondent to bear the costs of the Lower Court and this Court and the Honourable court be pleased to make such further and other orders as it may deem just in the circumstances of the case.

B. Background of the Appeal

3. The gist of the case in a nutshell is that the Appellants in this matter filed a plaint dated 1st November, 2019 in which they averred that the respondent is their brother and that the suit land originated from land parcel no.247 situated within Ruiru/Rwarera Adjudication Section which was the property of Juanina Karoki Musa, the mother to both the Appellants and the respondent herein and that the same was sub divided into Land parcels Nos.4050,4051,4052,4053,4054,4055,4056 and 4057 and shared among the children of the late Juanina Karoki Musa excluding the Appellants. That in particular, Land parcel No. 4053 was given to the respondent while parcel No. 4051 was given to one Julius Kairemia, a brother.
4. The Appellants averred that they claimed a share of the said family property and consequently lodged an objection No.2879 against land parcel no. 4051 and the objection was ruled in their favour where the said land parcel No. 4051 was subdivided into 3 portions namely 4051,10953 and 10954 and recorded in favour of Julius Kairemia, Rose Makandi Murithi and Grace Ntinyari.
5. The Appellants further averred that at all material times, the owners of land parcel numbers 10953 and 10954 Ruiru/Rwarera Adjudication Section having been excised from land parcel No. 4051 as part of their family property, inherited them from their late mother Juanina Karoki Musa in 1992.
6. The Appellants stated that the said land parcels are sub divisions of land parcel number 4051 Ruiru/Rwarera Adjudication section measuring about one and half acres that had been reserved and recorded in the name of their brother Julius Kairemia.
7. The Appellants further averred that the respondent had trespassed unto their said land parcels and barred them from cultivating their land and wanted to evict them.



8. The Appellants averred that the respondent was ordered to vacate from the said parcels of land but he continues to occupy, possess and utilize the said land to their detriment.
9. The Appellants claim that due to the matters aforesaid, they have been deprived of the use of their said land and have suffered loss and damage and therefore prayed for a declaration that land parcels numbers 10953 and 10954 Ruiriri/Rwarera Adjudication Section belong to the Appellants respectively, an order of eviction, Mesne profits and costs and interest of the suit.
10. The Appellants averred that they obtained the consent from relevant Adjudication Officer to file the suit.
11. The respondent filed a statement of defence and Counterclaim dated 5th December, 2019. The respondent admitted that LR. 4050, 4051, 4052, 4053, 4054, 4055 and 4057 all originated from LR. No. 247 Ruiriri/Rwarera Adjudication Section and was shared among the children of Juanina Karoki. He admitted that he was given L.R 4053 Ruiriri/Rwarera and LR No. 4051 was given to Julius Kairemia.
12. The respondent stated that the Appellants were not excluded from the land and it was only the wishes of the Original owner Juanina Karoki to share the land as she wished.
13. The respondent stated that the Appellants lodged an objection secretly against L.R No. 4051 without the knowledge of the respondent or Julius Kairemia, the owner of the land and through the said fraudulent objection which was allowed and the said L.R 4051 was subdivided into L.R NO.10953 and L.R No.10954.
14. The respondent further stated that he had bought LR. 4051 Ruiriri/Rwarera from Julius Kairemia through an agreement and averred that the purported objection of transfer and sub division of L.R 4051 was fraudulent, null and void and should be reversed.
15. It was the respondent's case that he has been in occupation and use of LR 4051 which he has fully developed after purchasing the same from his brother JULIUS KAIREMIA.
16. In his counterclaim, the respondent reiterated that the objection against LR. 4051 which was allowed was secretly filed by the appellants and that the land was fraudulently subdivided into parcels 10953 and 10954 and transferred to the appellants.
17. The respondent enumerated the particulars of fraud as filing an objection secretly and failing to serve the respondent and the land owner Julius Kairemia, failing to disclose that the owner of the land Julius Kairemia was alive and in Mombasa, failing to disclose that the respondent had bought the said land from Julius Kairemia, fraudulently presenting false facts before the Land Adjudication Officer, failing to serve the objection to all parties involved and conducting the whole process in a fraudulent manner.
18. The respondent stated that as a result of Appellants fraud the respondent reported the matter to the C.I.D for investigations and the investigations were ongoing.
19. The respondent prayed for an order to transfer LR. 10953 and 10954 Ruiriri/rwarera adjudication Section to him, the same having been acquired fraudulently by the appellants.
20. After considering the pleadings, the evidence and the submissions of the parties, the learned trial magistrate found that the respondent had proved his counterclaim and allowed the same and dismissed the appellant's suit with costs.
21. The appellants were dissatisfied with the said judgment and filed the present appeal.



22. The appeal was canvassed by way of written submissions which were duly filed by all the parties. The appellants filed their submissions dated 18th October, 2022 through the firm of M.D Maranya & Co. advocates while the respondent filed his dated 24th October, 2022 through the firm of Ayub K. Anampiu & co. advocates.

C. The Appellants' Submissions

23. With regard to ground 1, the appellants faulted the trial magistrate for admitting extraneous documents such as sale of land agreement that they say was never produced during the hearing of the case. That the respondent included the said sale agreement dated 22nd June, 2017 in his list of documents dated 18th August, 2020, but however did not produce the same in evidence, and that the trial court heavily relied on it. The appellants submitted that the said agreement did not form party of the evidence and the court ought not have relied on it in determining the matter.
24. The Appellants relied in the case of Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR where the Court of Appeal, faulting the trial judge for evaluating the evidence on record and basing his decision on a document that was marked but not formally produced as an exhibit held:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.



21. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents’ case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document “MFI 2” that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.
24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on “MFI 2” which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.
25. The Appellants submitted that the sale agreement dated 22nd June, 2017 was merely marked for identification and the same was not formally produced and the respondent did not lay foundation for its authenticity and relevance to the facts of the case. That he did not move the court to have the document produced as an exhibit and be part of the court record and submitted that the document was not formally produced and proved, and is only hearsay, untested and an unauthenticated account. It is therefore the appellant’s submissions that the respondent did not prove his claim that he bought the suit land from his brother.
26. With regard to ground 3 of the appeal, the appellants in their submissions faulted the learned magistrate for arriving at a decision that amounted to judicial review of the decision of the District Land Adjudication Officer or Appeal to the Minister.
27. The Appellants submitted that it is common ground that they acquired the suit land pursuant to objection proceedings lodged by the appellants before the DLASO against the recording of land parcel



number 4051 in the name of Julius Kairema. The appellants stated that they produced P Exhibit 1, a copy of the objection proceedings in objection number and the decision of the DLASO that land parcel number 4051 be subdivided and the appellants to get new numbers 10953 and 10954 while their brother Julius Kairema who was the defendant retains parcel number 4051.

28. The Appellants submitted that the suit land is in Ruiru/Rwarea Adjudication Section and ascertainment and recording of rights and interests thereof falls under the jurisdiction of the [Land Adjudication Act](#) which is a self-contained statute which provides a dispute resolution mechanism for those aggrieved by any decision or action taken under the Act. That where a party is aggrieved by the decision of the Adjudication Officer, they are required to file an appeal to the minister, which the respondent did not do. The appellants cited Sections 26 and 29 of the [Land Adjudication Act](#) which provides that;

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- (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

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- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

29. The appellants submitted that they were aggrieved by the recording of the entire parcel number 4051 in the names of Julius Kairema and they followed due procedure and filed objection number 2189 which objection was allowed and that if the respondent was aggrieved by the decision of the DLASO, he ought to have filed an appeal to the minister. The appellants relied on the case of *Kanampiu M'imberia v Julius Kathane & 3 Others* (2019) eKLR, wherein Learned Lady Justice L. Mbugua observed:

“The [Land Adjudication Act](#) is a self-contained statute that has detailed procedure of how matters are to be conducted and at what point the jurisdiction of the court is to be invoked.



The Supreme Court in the Case of Samuel Kamau & Another v. Kenya Commercial Bank and two others – Sup. Ct. Civil Application No. 2 of 2011 opined as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

In the case of Tobias Achola Osindi & 13 others versus Cypriano Otieno Ogalo & 6 Others, H.C.CNO 4 OF 2011 KISII, Okongo J made an elaborate statement regarding the dispute resolution mechanisms in adjudication processes. I find it necessary to give a lengthy extract from this case in order to put the whole adjudication process in a clear perspective.

“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the Court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot however usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land. Due to the foregoing, a consent issued by the Land Adjudication Officer under section 30 of the Act does not entitle any party who has an interest in land within an adjudication area to bring up to court for determination issues which should be determined by the adjudication officer or through the dispute resolution machinery laid out in the Act”.

30. The Appellants further relied in the case of Adballah Mangi Mohammed v Lazarus & 5 Others (2012) eKLR which was cited with approval in Nicholus Mugambi & Another (suing as the legal



representatives of the Estate of Peter Etharia M’Kailibi) & 4 Others v Zachary Baariu & 6 Others (2018) eKLR that:

“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property”.

31. The Appellants submitted that the respondent admitted that he did not file an appeal against the decision of the DLASO and was therefore not open for the respondent to opt to come before the court with allegations of fraud challenging the objection proceedings and the decision of the adjudication officer.
32. The Appellants submitted that the question of ownership had been determined by an organ authorized by law to do so under the Land Adjudication Act and that decision could not be challenged by way of an ordinary suit and if the respondent felt aggrieved by the decision to award land parcel 10953 and 10954 to the appellants, then he should have followed the dispute resolution mechanism stipulated under the Act, or move the High Court by way of Judicial Review under the provisions of the Law Reform Act and the Civil Procedure Rules 2010.
33. The Appellants submitted that the decision of the trial court faulting the legality of the proceedings before the adjudication officer was bad in law and that in ordering the appellants to transfer the suit property to the respondent, the learned magistrate simply quashed the decision of the DLASO awarding the land to the appellants in objection number 2189 which amounted to a judicial review of the decision of the DLASO of appeal to the minister.
34. The Appellants submitted that it is clear that the respondent was challenging the decision-making process of the DLASO on grounds that the decision was reached in a biased, fraudulent and deceitful means, which they submitted should have been filed in the High Court and not the magistrate’s Court by seeking Judicial orders of certiorari as provided under the Law Reforms Act and order 53 Rule 3 of the Civil Procedure Rules. That the magistrate’s court has no jurisdiction to entertain such proceedings.
35. The Appellants relied on the case of Commissioner of Lands v Kunste Hotel Limited (1997) eKLR where the Court of Appeal stated that :

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus:

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.”

36. The appellants submitted that the ownership of the suit land parcels 10359 and 10354 was fairly confirmed to them and they were entitled to file a claim for trespass against the respondent. That on the



other hand, the respondent could not challenge the validity and legality of the objection proceedings and decision of the adjudication officer in the appellants' suit for trespass.

37. On grounds 2 and 5 of the appeal which revolve around the award of the land to the respondent, the appellants faulted the trial magistrate for awarding the respondent land parcel number 10953 and 10954 Ruiru/Rwarera Adjudication Section while he was not a party to the Objection proceedings. That the Objection proceedings were filed by the appellants against their brother Julius Kairema and the proceedings were in respect of land parcel 4051 which was registered in the name of Julius Kairema and that only a Julius Kairema or a person acting on his behalf could challenge the award of the land to the appellants.

38. The Appellants cited that Order 9 of the Civil Procedure Rules which sets out who a recognized agent thus:

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

- (a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;

39. The appellants submitted that the particulars of fraud set out in the respondent's counterclaim clearly show that the fraud was allegedly committed against Julius Kairema and that the fraud is in reference to objection proceedings between the appellants and Julius Kairema who was at the time recorded as the owner of land parcel number 4051 and that the respondent did not enjoin the said Julius Kairema as a party to the proceedings herein, neither did he call him as a witness to support the allegations of fraud levied against the appellants and that there was nothing on record appointing the respondent to act as the agent of Julius Kairema in the proceedings herein in a manner that is recognized in law. Further, that the respondent did not produce evidence to show that he purchased the land from the original owner and submitted that the court had no basis to award the suit land to the respondent. The appellants faulted the trial magistrate for disinheriting the lawful beneficiaries and awarding almost the entire estate to the respondent who was never a party to the objection proceedings while disregarding the appellants.

40. The Appellants submitted that the trial court in its decision observed that the appellants were left out when the land was subdivided and shared among the male children and that there was nothing on record to suggest that their deceased mother had any intention to bequeath her female children land.

41. The appellants submitted that they adduced sufficient evidence to the effect that they were entitled to and had rightfully acquired the suit land and had followed the procedure provided for by law and that the decision of the DLASO had not been challenged as required by law. They further submitted that the learned trial magistrate erred in law and fact by awarding the respondent the suit land yet he was not party to the proceedings that led to the award of the land to the appellants. That by ordering the appellants to transfer the land to the respondent, the learned magistrate disinherited the appellants their share of the family land, and awarded the entire estate to the respondent since he had already gotten parcel 4053.

42. Grounds 6, 7 and 8 of appeal revolve around the court's analysis of the evidence on record and submissions by the parties. The appellants faults the trial court for taking into account irrelevant and extraneous factors such as allegations of fraud and threat by the appellants on the respondent yet there were no charges preferred upon them, and submitted that the learned trial magistrate therefore arrived to an erroneous verdict.



43. The Appellants contend that it is a legal requirement that allegations of fraud must not only be pleaded but strictly proved and relied on *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eKLR in which the Court of Appeal reiterated its finding in *Kinyanjui Kamau vs George Kamau* (2015) eKLR that:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

44. The Appellants submitted that any allegations of fraud must be proved to a standard above the balance of probabilities and that in the present case, the respondent simply stated that the appellants committed fraud against Julius Kairemia but that the elements of fraud pleaded were not specifically pleaded.

45. The Appellants submitted that there are so many unexplained mischiefs surrounding the respondent’s claim and his alleged acquisition of the land casting doubt on his case for fraud against the appellants. That the trial court clearly ignored these mischiefs and the trial magistrate was outrightly biased by ignoring material facts that shook the credibility of the respondent’s claim.

46. The Appellants further submitted that the Learned Magistrate erred in law and facts for failing to consider the Appellants’ submissions tendered before court, adding that, had she done so, she would have come to a different conclusion. The appellants submitted that the trial court in its judgment only considered that the appellants had raised the issue of lack of jurisdiction and misdirected itself on the concept of jurisdiction and found that it had jurisdiction to entertain the suit.

47. The Appellants further stated that other fundamental issues of the lack of evidence to the effect that the appellants had allegedly misrepresented to the land officers that Julius Kairemia was deceased, the respondent’s failure to produce the alleged sale agreement and call the persons who allegedly witnessed the sale agreement, and the failure to produce the letter allegedly written by Julius Kairemia directing the transfer of the suit land to the respondent were not considered in the judgement of the trial court. They submitted that had the court considered the appellants’ evidence and submissions, it would have found that the respondent had not proven his case against the appellants to the required standard and he was not entitled to the reliefs sought.

48. The Appellants urged the court to find that this appeal is merited.

D. Respondent’s Written Submissions

49. The respondent submitted that this appeal lacked merit and is an abuse of the court process and ought to be dismissed. The respondent submitted that the trial court was right in its decision which is now being challenged by this Appeal.

50. The respondent further submitted that ground 1 of the appeal must fail because the agreement which is being challenged was seen by the Court as an exhibit and forms part of the record and submitted that the court in making its decision was guided by the totality of the evidence tendered by the respondent and the Appellants and decided the matter on the balance of probabilities to arrive at the decision.



51. The respondent submitted that the trial court in arriving at the decision, properly evaluated the entire evidence presented before it and that it is trite law that a party is bound by their pleadings and urged the honourable court to look at the plaint in which the only prayer sought was for a declaration that the Land belongs to the Appellants and there was no other prayer sought.
52. The respondent submitted that the only ground in the appeal is only that the agreement was not produced as an exhibit but stated that the appeal cannot hold as the court had a chance to peruse the agreement and it was actually part of the record.
53. The respondent submitted that he testified as to how he acquired the suit land and proved all the particulars of fraud on the part of the appellants herein and submitted that it was fraudulent for the Appellants and the Land Adjudication officer to determine a dispute in the absence of the respondent who would be adversely affected by the decision and urged the court to find that the appeal was based on mere technicalities of procedure and dismiss the same with costs.

E. Analysis and Determination

54. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. 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 issues for determination in this appeal as I can deduce from the grounds of appeal are:
 - i. Whether the learned trial magistrate admitted extraneous documents that were never produced during the hearing.
 - ii. Whether the decision of the learned trial magistrate amounted to judicial review of the decision of the District Land Adjudication Officer or appeal to the Minister.
 - iii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.

Whether the learned trial magistrate admitted extraneous documents that were not produced during the hearing.

55. It is appellants' submission that the trial magistrate admitted extraneous documents such as a sale agreement that was never produced during the hearing of the case. The appellants specifically referred the court to pages 89 – 90 of the record. The court has perused the proceedings. At page 76 of the record of appeal, it is recorded that the respondent herein testified as D.W 1 and stated that he purchased parcel No. 4051 from his brother Julius Kairemia on 22nd June 2017 and a transfer was done. He referred to the agreement but Mr. Maranya is recorded to have objected to the production of the same and the court marked the agreement " DMFI 1"
56. However, at page 79 of the record, it is also shown that the respondent was recalled to produce some documents and Mr. Maranya indicated that he had no objection, though he had objected to several documents. It is however, not clear whether the said agreement was among the documents that were produced since it is also marked as 'P exhibit 1' as recorded at page 76.
57. In her judgment, the learned magistrate indicated that the respondent presented a sale agreement between himself and his brother. The appellants are the ones who filed this appeal and prepared the record of appeal. It is not shown that they returned to the trial court to rectify the record if indeed there were errors in it. From the way the proceedings have been captured, this court is not in a position



to ascertain whether or not the said agreement was produced. Nevertheless, it suffices to state that I do agree with the appellants submissions that there is a distinction between exhibits that have been produced and marked and documents that have been marked for identification. Therefore a court cannot base its decision on a document that was merely marked for identification.

Whether the decision of the trial magistrate amounted to judicial review of the decision of the District Land Adjudication Officer or appeal to the minister

58. The appellants faulted the trial court for arriving at a decision that amounted to judicial review of the decision of the District Land Adjudication Officer or appeal to the minister. It was the appellants' case that they acquired the suit land pursuant to objection proceedings lodged before the District Land Adjudication Officer against the recording of land parcel No. 4051 in the name of Julius Kairemia. Indeed the appellants produced a copy of the objection proceedings.
59. The court has however noted that in their own evidence, the appellants testified that their mother was the original owner of land parcel No. 247 before the same was subdivided into various portions. The evidence on record is clear that the parties' mother subdivided her land while still alive and shared it out among her male children. Julius Kairemia was given parcel No. 4051. While testifying, the 1st appellants confirmed that they never filed an objection when their mother was alive. The respondent's counterclaim was that he purchased parcel No. 4051 from his brother Julius Kairemia and took possession. That the appellants colluded with the Land Adjudication Officer and filed an objection which was never served upon the said Julius Kairemia or the respondent. Instead, the appellants alleged that their brother Julius was deceased and/or had been away for long, and they obtained the land parcel 4051 and transferred portions 10953 and 10954 to themselves.
60. In this case, there was evidence of a fraudulent scheme that was hatched by the appellants to disinherit their brother Julius Kairemia and or the respondent who had bought the land. This was a clear case of fraud, and not judicial review as submitted by the appellants. Being a claim based on fraud, it is my finding that the trial court had the requisite jurisdiction to determine the matter. I am therefore not persuaded that the trial court was reviewing lawful objection proceedings, but determining a claim of fraud.

Whether the decision of the trial magistrate was against the weight of the evidence and the law.

61. From the material on record, it is clear that the suit property was originally registered as parcel No. 247 in the name of Juanina Karoki Musa, the mother to the parties herein. That before her demise, Juanina Karoki Musa (deceased) subdivided the land into several portions which she shared out among her male children including the respondent and Julius Kairemia Musa. For whatever reason, it is apparent that the appellants were excluded and were not allocated any land by their deceased mother. The appellants however never lodged any objection against their mother when she was sharing out her land. Land parcel No. 4051 was given to Julius Kairemia Musa. It is that land that the respondent claimed to have bought from his brother Julius Kairimia.
62. Having reviewed the entire evidence on record, and considering the standard of proof with regard to fraud allegations, which is higher than that required in ordinary civil cases, the court is satisfied that the learned trial magistrate rightly reached a finding that the respondent had proved his claim against the appellants to the required standard. The appellants themselves admitted that their mother shared her land and left them out. They never lodged any objection then. Instead, the appellants lodged a fictitious object against Julius Kairemia who they deliberately ensured was not summoned to appear before the Land Adjudication Officer. The respondent's contention that he purchased the suit plot from his brother was not challenged. Moreover, his occupation and possession of the suit premises



corroborates the evidence that the respondent indeed purchased the land. If it were not so, then Julius Kairemia is the one who could have taken steps to evict the respondent and not the appellants.

63. I find that the evidence on record was sufficient to prove that the respondent had proved his counterclaim on a balance of probabilities and the appellants' suit was rightly dismissed. I find no reason to upset the decision made by the learned magistrate. I am satisfied that the learned trial magistrate was justified in arriving at the decision she made which was well founded and I find no basis to interfere with it.
64. In the result, I find no merit in the appellants' appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF MARCH 2023

In the presence of:

CA Kibagendi

No appearance for Appellants

No appearance for Respondents

C. K. YANO

JUDGE.

