



**Mukii (Suing as the Personal Representatives of the Estate of
Ndolo Mukii - Deceased) v Masesi (Environment and Land Appeal
E002 of 2022) [2023] KEELC 17221 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E002 OF 2022**

A NYUKURI, J

MAY 3, 2023

BETWEEN

**MUSYOKA MBWELE MUKII (SUING AS THE PERSONAL
REPRESENTATIVES OF THE ESTATE OF NDOLO MUKII -
DECEASED) APPELLANT**

AND

JOSEPH MUTUNGA MASESI RESPONDENT

*(Being an appeal against the Judgment of Honourable Martha Opanga Senior Resident
Magistrate delivered on 21st day of December 2021 in Kangundo SPMCC ELC No. E23 of 2020)*

JUDGMENT

Introduction

1. The Appellant herein being dissatisfied with the judgment delivered on 21st December 2021 in Kangundo SPMCC ELC No. E23 of 2020 by Hon. Martha Opanga, appealed against the said judgment vide the Memorandum of Appeal dated 13th January 2022 on the following grounds;
 1. The Learned Magistrate erred in law and fact and misdirected herself by failing to consider that the Appellant had discharged his burden of proof in proving that the Respondent had illegally and fraudulently transferred the suit property to himself.
 2. That the learned Trial Magistrate erred both in law and in fact by dismissing the Appellant's suit despite the fact that the same had been proved against the Respondent on a balance of probabilities.



3. That the Honourable Court erred in law and fact for failing to enter judgment for the Appellant notwithstanding the fact that the Appellant's pleadings and evidence on record had established a strong case to warrant grant of the reliefs sought.
 4. That the Honourable Magistrate erred in law and fact by ignoring the submission adduced by the Appellant.
 5. That the trial court misdirected itself by relying on the extraneous matters and or factors to dismiss an otherwise legally tenable claim by the Appellant.
2. Consequently, the Appellant sought the following orders;
- a. That this appeal be allowed, the judgment and decree of the subordinate court be set aside and be substituted with a judgment and order of this court allowing the Appellant's prayers set out in the plaint dated 26th November 2020.
 - b. Costs of this appeal be borne by the Respondent.

Background

3. The background of this case is that by a plaint dated 26th November 2020, the Plaintiff, who is the Appellant in this appeal filed suit against the Defendant (the Respondent herein) seeking the following orders;
 - a. A permanent injunction restraining the Defendant whether by himself or his agents, employees, servants or subjects from entering, cultivating, dividing, constructing, trespassing, interfering, residing, selling, sub-letting, transferring, charging, alienating or in any way dealing with the land known as Matungulu/ Kambusu/1346 and Matungulu/Kambusu/1540.
 - b. Cancellation of title deed known as Matungulu/Kambusu/1346 and any other suitable relief as the Honourable Court may deem fit and just to grant in the circumstances.
 - c. Costs and interest of this suit.
4. The Plaintiff averred that Ndolo Mukii (deceased) was the registered proprietor of Parcel No. Matungulu/Kambusu/1540 (hereinafter referred to as Parcel No. 1540) which the Defendant unlawfully and fraudulently subdivided thereby excising a portion therefrom measuring 0.41 Ha and obtained a Title No. Matungulu/Kambusu/1346 (hereinafter referred to as Parcel No. 1346) (suit property) which he transferred to himself. He stated that the Defendant had trespassed on the two parcels with intention of selling the land to a third party.
5. On 24th December 2020, the Defendant filed a defence dated 21st December 2020. He denied the Plaintiff's claim and averred that he was a stranger to the Plaintiff's allegations as Land Parcel No. Matungulu/Kambusu/1346 has never had any relationship whatsoever with Land Parcel No. Matungulu/Kambusu/1540. He sought for the dismissal of the suit.

Evidence

6. PW1, Musyoka Mbwele Mukii, the Plaintiff in the suit, testified that the suit property belonged to the deceased. He stated that Land Parcel No. Matungulu/Kambusu/1540 belonged to Ndolo Mukii (deceased) and that the Defendant without his consent or authority unlawfully and fraudulently subdivided that title and obtained title No. Matungulu/Kambusu/1346 yet the Plaintiff has been on that land, and that the Defendant has never been on that land. In cross-examination, he confirmed his grandfather was one Mukii Makumi and that the deceased Ndolo Mukii only dealt with Parcel No.



- 1540 and not Parcel No. 1346. He insisted that Parcel No. 1346 was a subdivision of Parcel No. 1540. He confirmed that from his own documents, title for Parcel No. 1346 was issued earlier than the title for Parcel No. 1540.
7. PW2 was Daniel Mutunga Munyilu who stated he resides in Matungulu and that he first saw the Defendant in 2019 when a boundary was fixed on the land as the same was previously being used as a block. In cross-examination, he stated that his land is Parcel No. 1526 and it borders the suit property. That marked the close of the Plaintiff's case.
 8. DW1, Joseph Mutunga Masesi the Defendant adopted the evidence in his witness statement. He stated that he was the registered owner of Parcel No. Matungulu/Kambusu/1346 measuring 0.41 Ha which he inherited from his late grandfather Mukii Makumi in 1969. He stated that he had been given the land by his grandfather; that land adjudication was done in 1983 and he was registered as proprietor thereof in 2003 being the first registration. He stated that he has had quiet possession of the suit property. He stated that the Plaintiff's suit took him by surprise as he has never had any dispute with the deceased in relation to Parcel No. 1540. His position was that the Plaintiff's suit was motivated by greed as the Plaintiff had learnt that he had sold the suit property in 2020.
 9. In cross-examination, he confirmed that his grandfather was Mukii Makumi and that his mother is the one who was given the land by her father and then gave the Defendant the land. He stated that in 2019, the surveyor was on the land because the boundary fixed in 1983 had been destroyed. That marked close of defence case.
 10. Upon hearing both parties, the trial court framed the issues before court as whether the Defendant unlawfully subdivided parcel No. Matungulu/Kambusu/1540 and transferred to himself a portion thereof measuring 0.42 Ha which is now known as Parcel No. 1346. The trial court subsequently made a finding that Parcel No. 1540 and Parcel No. 1346 are two distinct and separate parcels both registered as first registrations and both were registered in Map Sheet No. 20. The trial court also found that therefore Parcel No. 1346 did not emanate from a subdivision. The trial court further found that the allegation that the Plaintiff has always used the entire block does not mean that the suit property is part of Parcel No. 1540. Therefore the trial court found no fraud or illegality in the registration of the suit property in the Defendant's name and consequently held that the Plaintiff had failed to prove his case on the required standard and dismissed the suit with costs.
 11. It is the above findings by the trial court that provoked this appeal.
 12. This appeal was disposed by way of written submissions. On record are the Appellant's submissions filed on 24th June 2022 and the Respondent's submissions filed on 7th July 2022.

Appellant's Submissions

13. Counsel for the Appellant submitted that the issue in dispute was the validity of Parcel No. 1436 which was hived from Parcel No. 1540. Counsel argued that although the Defendant stated that he got the suit property from his mother, no documentary evidence was given in support of the said allegations and that no minutes were produced to prove the meeting done in 1969 and no witness was called to corroborate his story. Counsel argued that although the Defendant referred to an adjudication process, no adjudication proceedings were produced by him.
14. Counsel argued that the title produced by the Respondent was not sufficient evidence as the Respondent did not reside on the suit property. Counsel relied on Section 26 of the [Land Registration Act](#) to contend that the root of the Defendant's title has been challenged and that the Defendant was obligated to produce evidence before court to show that he inherited the land from his mother.



15. Reliance was also placed on Section 107 of the *Evidence Act* to argue that the Respondent had failed to discharge the burden of proof of the root of his title.
16. Counsel also argued that the Appellant had been in uninterrupted possession of the suit property for over 30 years to the exclusion of the Respondent. Counsel argued that Parcel No. 1540 was being used as a block and there were no boundaries on the land until 2019 when the boundary was fixed. Counsel argued that the Appellant had proved his case by showing that the beneficiaries of Ndolo Mukii were in active use of the suit property without interference for over 30 years that the Respondent was laying claim on the deceased's estate without demonstrating documentary evidence of the root of his title and that the Appellant had demonstrated that the Respondent had illegally subdivided the property to produce two titles and register himself as a title holder of one title without authority.
17. Counsel referred to the case of *Daudi Kiptugen v. Commissioner of Lands & 4 Others* [2015] eKLR, for the proposition that to demonstrate validity of title, the claimant must show that the title was property acquired.

Respondent's Submissions

18. The Respondent submitted that the issues that the appeal has raised are;
 1. Whether the Appellant proved fraud to the required standard;
 2. Whether the orders sought should be granted and appeal allowed;
 3. Who should bear the costs of the appeal.
19. On the question of whether fraud was proved by the Appellant, counsel submitted that the Appellant's suit in the subordinate court was that the title for Parcel No. 1346 was as a result of the fraudulent subdivision of Parcel No. 1540. Counsel pointed out that from the documents produced in evidence, it was clear that Parcel No. 1346 was registered on 17th July 2003 and that the title No. 1540 was registered on 3rd November 2014. Counsel argued that it is absurd that the Plaintiff claims that the suit property was as a result of subdivision of Parcel No. 1540. Counsel contended that no mutations were produced and that the green cards produced showed that the registration of the suit property was a first registration.
20. Counsel argued that the standard of proof in respect of fraud is not as that in ordinary civil matters. Reliance was placed on Sections 107, 108 and 109 of the *Evidence Act* to argue that whoever alleges must prove. The court was referred to the cases of *Rosemary Wanjiku Murithi v. George Maina Ndinwa* [2014] eKLR and *Central Bank of Kenya v. Trust Bank Ltd & 4 Others* Civil Appeal 215 of 1996, for the Proposition that the burden of proof for fraud is higher than in ordinary civil cases.
21. It was further contended for the Respondent that for the appeal to be allowed the Appellant must prove that the trial court erred in fact and or law. It was their case that the trial court's findings were proper. Counsel sought for dismissal of the appeal together with costs.

Analysis and Determination

22. I have carefully considered the appeal, submissions and the entire record. The only issue raised in the appeal as can be deduced from the five grounds of appeal, is whether the trial court misdirected itself in finding that the evidence adduced by the Appellant was not sufficient to prove their case on the required standard.



23. This being a first appeal, the duty of this court is to re-evaluate, reconsider and reanalyse the evidence on record afresh and to make its own conclusions, but keeping in mind that it had no opportunity to see or hear witness who testified before the trial court, and therefore the court should give due allowance for that.

24. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal discussed the role of the first appellate court as follows;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

25. In the instant appeal, the Appellant's complaint is that the evidence he presented before the trial court was sufficient to prove his claim but that the trial court erred in dismissing his case. It is trite that parties are bound by their pleadings. The plaint raised one issue; that Parcel No. Matungulu/Kambusu/1540 registered in the name of Ndolo Mukii was fraudulently subdivided by the Respondent to create among others title No. Matungungu/Kambusu/1436, which he registered in his name. In view of the above, the Appellant was obligated to prove that the Respondent unlawfully and fraudulently subdivided Parcel No. Matungulu/Kambusu/1540 and created Title No. 1346, which he unlawfully registered in his name.

26. It is trite law that whoever alleges must prove their allegations. Section 107 of the *Evidence Act* places the legal burden of proof in a case on the Plaintiff as follows;

1. Whoever desires any court to give judgment as to any legal right or liability dependant 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.

27. Sections 108 and 109 of the *Evidence Act* provides as follows;

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.
108. 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.

28. In the case of *Raila Amolo Odinga & Another v. IEBC & 2 Others* [217] eKLR, the Supreme Court discussed the evidential burden of proof at paragraphs 132 and 133 of the judgment as follows;

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
132. It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that



assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondents to adduce evidence to prove compliance with the law ...

29. Therefore the legal burden in a case lies on the Plaintiff throughout the trial. However, the evidential burden of proof may shift to the Defendant depending on the nature and import of the evidence adduced by the Plaintiff.
30. On whether the Appellant discharged the burden of proving that the Respondent fraudulently and unlawfully subdivided Parcel No. 1540 to create Parcel No. 1346 which he transferred to himself, I note that the Appellant alleged as much and produced a sketch map allegedly done in 1973, a distribution agreement dated 15th October 1988 by one R. Ndolo, a letter dated 6th April 2021 by the Appellants counsel, a green card for Parcel No. 1540, the chief's letter of 6th December 2010 and a receipt for a caution placed on the suit property.
31. Having perused all the documents produced by Appellant, a part from a receipt of Kshs. 500/- for a caution on the suit property no other document was produced by the Appellant in respect of the suit property. The green card produced was for Parcel No. 1540 which shows that the same was registered in the deceased's name on 30th January 2003 and a title thereof issued on 3rd November 2014. No other transaction has been registered on that title, leave alone a subdivision. Therefore the said title remains intact from the time of registration upto the time of filing suit when the green card was obtained. The distribution agreement produced by the Appellant refers only to Parcel No. 1540 and no reference whatsoever was made in regard to the suit property. In any event that document was alleged to have been written by the proprietor of Parcel No. 1540 and therefore it had no bearing on the suit property as the alleged author could only legally deal with what belonged to him; which was Parcel No. 1540. In addition, although the Chief's letter states that the suit property was fraudulently registered in the Respondent's name, that is merely the Chief's opinion and no evidence was attached to back up the allegations.
32. I also note that no document was produced by the Appellant in relation to the registration of the suit property. Not even a search thereof. It is the Respondent who produced the green card for the suit property which showed that the was registered as proprietor thereof on 30th January 2003 and a title thereof issued to him on 7th July 2003.
33. My considered view therefore, is that the Appellant having alleged that the suit property's registration emanated from subdivision of Parcel No. 1540, ought to have provided the nexus between the two parcels by showing that Parcel 1540 was registered first and that the suit property was created from Parcel No. 1540 pursuant to a subdivision. A copy of a green card in respect of title No. 1540 should have been sufficient to prove the allegation if indeed such subdivision occurred. As earlier pointed out, the green card for Parcel No. 1540 shows that that title is a first registration and no instrument has so far been registered against that title. Therefore I find and hold that Parcel No. 1540 has never been subdivided as alleged or at all.
34. Even on considering a copy of the register of the suit property, it shows that the same is a first registration and did not emanate from any subdivision. I therefore find and hold that there is no nexus between Parcel No. 1540 and Parcel No. 1346, therefore the Appellant did not prove any of his allegations of the suit property having been created from a subdivision of Parcel Number 1540.



35. As the Appellant did not attempt to discharge his burden of proof, there was nothing for the Respondent to rebut and therefore the evidentiary burden of proof never shifted to the Respondent. I must observe that in both the pleadings in the trial court, the evidence and the submissions herein, the Appellant missed the mark. I reject the Appellant's submissions that the Respondent failed to prove the root of his title. The Respondent never had any claim and therefore the legal burden of proof could not be placed on him.
36. Having considered the findings of the trial court, it is my finding that the trial court rightly found that the allegations made against the Respondent were not proved. Therefore the trial court did not error in dismissing the suit.
37. I have considered the pleadings and the evidence, and I find that there was no thread of evidence upon which the Appellant's claim could be anchored. The suit may have been actuated by something else other than the pursuit for justice, as the allegations of the Appellant are simply false allegations and based on obviously non-existent facts.
38. The upshot is that this Appeal lacks merit, and the same is hereby dismissed. The costs of the appeal shall be borne by the Appellant.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Nzioka for Appellant

Mr. Munguti for Respondent

Ms Josephine – Court assistant

