



**Kasimu v Kasimu (Represented by Collins Musyani Muthangya as Administrator of the Estate of the John Muthanga Kasimu) & another (Environment and Land Appeal 37 of 2021) [2023] KEELC 20557 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20557 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 37 OF 2021  
LG KIMANI, J  
OCTOBER 3, 2023**

**BETWEEN**

**DAVID MWANIKI KASIMU ..... APPELLANT**

**AND**

**JOHN MUTHANGA KASIMU (REPRESENTED BY COLLINS MUSYANI MUTHANGYA AS ADMINISTRATOR OF THE ESTATE OF THE JOHN MUTHANGA KASIMU) ..... 1<sup>ST</sup> RESPONDENT**

**TOWN COUNCIL OF MWINGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Acting Senior Principle Magistrate Honourable H. M. Nyaberi in Mwingi SRMCC No. 56 of 2002 delivered on 21st November, 2002)*

**JUDGMENT**

1. This is an appeal from the judgment of the Acting Senior Principle Magistrate Honourable H. M. Nyaberi in Mwingi SRMCC No. 56 of 2002 delivered on 21<sup>st</sup> November 2002. The Appellant was the Plaintiff while the Respondents were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.
2. The Appellant filed a plaint dated 2<sup>nd</sup> August 202 where he claimed to be the owner of plot number 15 Mwingi Township measuring 50 feet by 50 feet. He stated that sometime either in the 1980s or early 1990s the 1<sup>st</sup> Defendant through stealth and fraud caused the 2<sup>nd</sup> Defendant to subdivide the plot into two numbering the subdivisions 15A and 15B. In 1993 the 1<sup>st</sup> Defendant by stealth and fraud caused plot number 15A to be transferred from the Plaintiff and to be registered in the 1<sup>st</sup> Defendant's name. In 2000, the 1<sup>st</sup> Defendant with the support of the 2<sup>nd</sup> Defendant began laying claim to plot number 15B and unlawfully and wrongly constructed 4 outhouses on part of the said plot and created a right of way between plots 15A and 15B to the said outhouses.



3. The Plaintiff accused the two Defendants jointly and severally of having committed acts of fraud and in the process interfered with his right of possession of the suit plots 15A and 15B. He gave details and particulars of fraud. The Appellant prayed for judgment against the Defendants for declarations that the Plaintiff is the bonafide legal and beneficial owner of parcels Nos. 15A and 15B. He also sought a declaration that the 1<sup>st</sup> Defendant has fraudulently acquired rights and interests over parcels Nos. 15A and 15B. Lastly, he prayed for an order of permanent injunction to restrain the Defendants from interfering with his rights and interests in parcel Nos. 15A and 15B.
4. The 1<sup>st</sup> Defendant filed a Re-Amended Defence dated 10<sup>th</sup> March 2006 where he denied the Plaintiff's claim and in particular allegations of fraud particularized in the plaint. Together with the defence, the 1<sup>st</sup> Defendant filed a counterclaim and stated that he was the owner of plot number 15A situated in Mwingi Municipality where he had erected a building comprising frontal rental business premises and four rear residential rooms with a monthly rental income of Kshs. 9,000. He stated that from November 2002, the Plaintiff fraudulently and deceitfully let out his premises to tenants and collected rent without remitting the same to him. He claimed the said amount of Kshs. 9,000 per month from November 2002 till the time the Plaintiff would vacate the premises. He prayed for dismissal of the Plaintiff's suit and for judgement to be entered in his favour for vacant possession of plot number 15A, payment of Kshs. 9,000.00 per month from November 2002 until the obtained vacant possession of the suit plot.
5. The 2<sup>nd</sup> Respondent filed a defence dated 3<sup>rd</sup> September, 2002 where it denied the plaintiff's claim and in particular the allegations of fraud particularized in the plaint.
6. The trial court dismissed the Plaintiff's suit with costs and allowed the 1<sup>st</sup> Defendant's counterclaim in terms of the prayer seeking vacant possession of plot number 15A stating that the Plaintiff had not proved fraud to the required standard. The court found that the allegations of fraud and collusion between the Respondents were mere allegations not supported by any conclusive material facts.
7. The 1<sup>st</sup> Defendant being dissatisfied by the judgement of the trial court filed this appeal through the Memorandum of Appeal dated 29<sup>th</sup> November 2012 on the following grounds;
  1. The Learned trial magistrate erred in fact and law in holding that the appellant had not established fraud on the part of the Respondents.
  2. The Learned trial magistrate erred in fact and law in holding that parcels No's 15A and 15B initially belonged to the appellant and 1<sup>st</sup> respondent's mother.
  3. The Learned trial magistrate erred in fact and law in holding that the transfer of plot No. 15A to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent was regular.
  4. The Learned trial magistrate erred in fact and law in failing to analyse the evidence on record.
  5. The decision of the trial magistrate is against the weight of the evidence on record.
  6. The judgement of the Ag. Senior Principle magistrate is wrong in principle and is founded on the consideration of extraneous and irrelevant matters.
  7. The judgement of the Ag. Senior Principle Magistrate is flawed

### **Summary of Evidence at the trial**

8. Hearing of the suit commenced on 12<sup>th</sup> November 2018 and the Plaintiff testified as PW 1 and called five witnesses. He reiterated the contents of the plaint and testified that the 1<sup>st</sup> Defendant is his brother.



He claimed that he purchased plot No. 14 from another brother Mangaro Kasimu for Kshs 15,000 but the plot was later changed to number 15. He constructed several rooms on the plot which he let to various people. He stated that the defendants through stealth and fraud conspired and subdivided his plot No. 15 into two and renamed it numbers 15A and 15B without his knowledge or consent and had plot 15A transferred to the 1<sup>st</sup> Defendant. He also complained that the 1<sup>st</sup> Defendant constructed 4 outhouses on plot 15B and obtained a passage between the two plots to the outhouses. He stated that he has been paying rates for plot 15B.

9. He confirmed that a consent order was at some point in the suit recorded settling this suit but the same was later set aside by the court. He also stated that he reported the fraud to the police.
10. PW 2 Mwendwa Nzenge testified that he is a mason and confirmed that the Plaintiff owned the suit plots and that he was contracted to construct one house on the suit land for the Plaintiff.
11. PW 3 Ngana Mutia testified that he witnessed the sale agreement between the Plaintiff and Mangalo Kasimu in 1970 for a sale price of Kshs. 15,000. Upon cross-examination, he stated that he signed a typed agreement after the suit had been filed and he signed it in court. He stated that in 1970 he signed a book.
12. PW 4 Lameki Nziza Mung'aro admitted knowing the Plaintiff and the 1<sup>st</sup> Defendant. she confirmed that her husband Mung'aro Kasimu sold the plot in issue to the Plaintiff and she witnessed the agreement. Upon cross-examination, she stated that the plot belonged to her husband even in 1947 and stated that the agreement was signed where the plot is situated.
13. PW 5 Francis Kyondo Mulandi testified that he was a councillor at Kitui County Council from 1963 to 1974 and chairman of the treasury market committee and he witnessed the transfer of the plot from Mungalo Kasimu to the Plaintiff.
14. PW 6 Rose Mutambu testified and stated that the Plaintiff was her immediate neighbour she had known him since 1979 and she saw him build on the plot which currently has tenants.
15. The defence case commenced on 10<sup>th</sup> March 2010 when the 1<sup>st</sup> Defendant John Muthangya Kasimu testified stating that he was a councillor in Kiome ward Kitui County and the Plaintiff was his elder brother. He stated that the plot measuring 50 by 100 feet belonged to his father who passed on in 1946 but before then he had given the plot to him and by then it had a wooden structure run as a hotel. He brought the Plaintiff to run the hotel on his behalf while he was the one paying rates and the Plaintiff used to live on the plot,
16. He stated that before his mother's demise, she told him to give the Plaintiff half of the plot and as a result, the plot was subdivided into two plots No. 15A and 15B with plot 15A being given to the Plaintiff while he got plot 15B. He stated that he had no claim in plot number 15A. The 1<sup>st</sup> Defendant testified that Mwingi Town Council was established on 19<sup>th</sup> October 1992 and the town was surveyed on 14<sup>th</sup> March 1989.
17. The Defendant testified that the Plaintiff used to collect rent from the premises for him but he stopped in 1993. Further, when the case was pending the family tried to resolve the matter and an agreement was reached and a consent filed in court marking the dispute as settled but the Plaintiff failed to adhere to the terms of the agreement when he refused to transfer to him the plot number 70B in Migwani and the consent was reviewed by the court and set aside. Upon cross-examination, he stated that the plot was registered in the Plaintiff's name because he (the 1<sup>st</sup> defendant) could not be registered because he was a civil servant. The registration remained till 1993. He stated that the plots were subdivided and transferred on agreement with the Plaintiff.



18. He further testified that the Plaintiff complained to the CID about the alleged fraud, instituted private prosecution and filed a judicial review application but all did not succeed since he was not charged with any offence. He denied colluding with the 2<sup>nd</sup> Defendant to have the plot transferred to himself. He stated that his signature and that of the Plaintiff were taken for examination and they were found to have been properly appended on the transfer documents.
19. DW 2 Mwangi Kavali testified and stated that he was an employee of the Town Council of Mwingi as a market inspector. He produced in court a letter dated 30<sup>th</sup> March 2011 addressed to the 1<sup>st</sup> Defendant Ref TCM/17/22/1 and related to plot No. 15A Mwingi market showing that on 23<sup>rd</sup> September 1993, it was transferred by Mwingi Urban Council to Muthangya Kasimu. He confirmed that the holder of the plot David Mwaniki Kasimu filed a transfer form transferring the plot to the 1<sup>st</sup> Defendant though he filed a protest letter after the transfer had already been effected. He confirmed that the transfer was not fraudulent.

### **Analysis and Determination**

20. This being a 1<sup>st</sup> appeal, the court reminds itself of the role of a first appellate court as was stated by the Court of Appeal in *Selle & Another V Associated Motor Boat Company & Others*, [1968] EA 123:

“... is to reconsider the evidence, evaluate it and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
21. On the mandate of an appellate court, the court proceeded to state as follows:

“... In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”
22. Based on the grounds of appeal contained in the Memorandum of Appeal dated 29<sup>th</sup> November, 2012, the Record of Appeal and submissions by Counsel for the parties, the court proposes to deal with all the grounds of appeal together as was dealt with by counsel for both parties. The grounds of Appeal deal with the question of “Whether the learned trial Court misdirected himself in failing to find that plot number 15 Mwingi town was fraudulently and wrongfully subdivided into plot numbers 15A and 15B and fraudulently and wrongfully transferred plot number 15A to the 1<sup>st</sup> Respondent and whether the Appellant proved his case on a balance of probabilities.”
23. The Appellant claims to be the owner of plot number 15 Mwingi Township measuring 50 feet by 50 feet (then known as plot No. 14 Mwingi) which he purchased from his brother Mang’aro Kasimu on 25<sup>th</sup> January 1970 at a consideration of Kshs. 15,000. He states that the number was later changed by Kitui County Council from plot No. 14 to 15 with the Plaintiff as the proprietor. He stated that he pulled down the temporary structure then on the plot and constructed two shops each measuring 25 feet by 25 feet and let them to different tenants at different times. He further stated that either in the 1980s or early 1990s when the 1<sup>st</sup> Defendant was elected councilor of Mwingi County Council, through stealth and fraud he caused the 2<sup>nd</sup> Defendant to subdivide the plot into two numbering the subdivisions 15A and 15B.
24. In 1993 the 1<sup>st</sup> Respondent by stealth and fraud caused plot number 15A to be transferred from the Appellant and to be registered in the 1<sup>st</sup> Respondents name. In 2000, the 1<sup>st</sup> Respondent with the



- support of the 2<sup>nd</sup> Respondent began laying claim to plot number 15B and unlawfully and wrongly constructed 4 outhouses on the space to the rear of the said plot. The 1<sup>st</sup> Defendant also began to ask the Appellant for a right of way between parcels 15A and 15B to the outhouses.
25. The Appellant accused the two Respondents jointly and severally of having committed acts of fraud and in the process interfered with his right of possession of the suit plots 15A and 15B. He gave particulars of fraud as fraudulently and corruptly subdividing parcel No. 15 without involving him as the proprietor and transferring a portion named 15A to the 1<sup>st</sup> Respondent, forging his signature on the applications for subdivision and transfer, ignoring the Appellant's Advocates letter dated 20<sup>th</sup> February 1994 and insisting that the two plots were jointly owned with the 1<sup>st</sup> Respondent. He also stated that the 2<sup>nd</sup> Respondent assisted the 1<sup>st</sup> Respondent in getting an access path created between the two plots, influencing tenants not to renew tenancy and pay rent.
  26. The 1<sup>st</sup> Respondent filed a Re-Amended Defence dated 10<sup>th</sup> March 2006 where he denied the Appellant's claim and in particular allegations of fraud particularized in the plaint. Together with the defence, the 1<sup>st</sup> Respondent filed a counterclaim and stated that he was the owner of plot number 15A situated in Mwingi Municipality where he had erected a building comprising frontal rental business premises and four rear residential rooms with a monthly rental income of Kshs. 9,000. He stated that from November, 2002, the Appellant fraudulently and deceitfully let out his premises to tenants and collected rent without remitting the same to him. He claimed the said amount of kshs. 9,000.00 per month from November 2002 till the time the Appellant would vacate the premises.
  27. The 2<sup>nd</sup> Respondent filed the defence dated 3<sup>rd</sup> September, 2002 where it denied the plaintiff's claim and in particular the allegations of fraud particularized in the plaint.
  28. Counsel for the Appellant faults the trial court for having misdirected itself and accepted the evidence of the 1<sup>st</sup> Respondent despite anomalies in the evidence adduced by the 1<sup>st</sup> Respondent vis-a-vis the pleadings filed. Counsel pointed out that in his evidence the 1<sup>st</sup> Respondent stated that his plot was number 15B while the plot belonging to the Appellant was 15A. He also pointed out that the 1<sup>st</sup> Respondent was categorical that he had no interest in plot 15A while in the re-amended Defence, the 1<sup>st</sup> Respondent changed from claiming plot number 15B to plot number 15A. Counsel claimed that had the trial court applied his mind to the pleadings and the evidence he would have discovered that the 1<sup>st</sup> Respondent's evidence did not align to the Re-amended defence and counterclaim.
  29. The Appellant further claimed that failure by the Respondents to produce in court the application for subdivision of plot number 15 and transfer of plot number 15A was proof that the two documents were irregular and fraudulent.
  30. The 1<sup>st</sup> Respondent, however, submitted that the Appellant's above submission was an attempt to shift the burden of proof from himself to the Respondents by requiring them to produce the application for subdivision and transfer.
  31. On whether the learned trial court misdirected himself by not holding that the Respondent obtained the suit property fraudulently, it was important for the Appellant to prove on a balance of probabilities that the signature on the documents used to effect subdivision and transfer was indeed not his as he claimed.



32. Sections 109 and 112 of the *Evidence Act* provide that:
- “ 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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
33. The law is clear as buttressed in the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “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 pleading. 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 ours)
34. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-
- “...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 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 ours)
35. The onus was therefore on the Appellant who sought to rely on fraud on the part of the Respondent and alleged forgery on his documents to prove to the court that he did not sign any of the documents of subdivision and transfer of the plots subject matter of this appeal.
36. The Appellant produced as exhibits before the trial court a letter dated 28<sup>th</sup> December 1993 from Mwingi Urban Council addressed to him informing him that his application to transfer plot number 15A (25 X 100) Mwingi Market to John Muthangya Kasimu had been recommended by the works, Town Planning and Markest Committee meeting held on 23<sup>rd</sup> September 1993 and approved by the full council meeting held on 19<sup>th</sup> November 1993. The Appellant also exhibited a letter he wrote in reply to the Mwingi Urban Council dated 20<sup>th</sup> February 1994 where he stated that the transfer of plot number 15A was not known to him and was done without his knowledge by John Muthangya Kasimu and Cllr. Katuku Ng’ati. He requested that Min. No. 38/94 be cancelled by the Town Council.
37. It is noted that the Appellant did not at this point state that there was any anomaly or problem with the subdivision of plot number 15 into two and the renaming of the two subdivision parcels as 15A and 15B. After the letter by the Appellant, it is noted further that he did not take any action to have the transfer of plot number 15A to the 1<sup>st</sup> Respondent cancelled and/or nullified and the plot reverted to him.
38. The next communication was the letter by Mbiti & Co. Advocates dated 7<sup>th</sup> March 2000 addressed to the 1<sup>st</sup> Respondent. In the said letter it is also noted that the Advocate did not question the subdivision



of the plot. This time the issue was the construction that the 1<sup>st</sup> Respondent was undertaking at the back space of plot number 15B which is stated to have been done while the Appellant had already constructed two shops at the front part of the plot and that they had not sorted out that matter with him.

39. The 1<sup>st</sup> Respondent replied to the said letter stating that plot number 15B belonged to him and that he was not building on the Appellant's plot. He contended that he would not stop the construction.
40. From the foregoing communication, it is clear that the Appellant was aware of the subdivision of plot number 15 into plots 15A and 15B. If he had a problem with the transfer of plot number 15 A to the 1<sup>st</sup> Respondent as stated in the letter dated 20<sup>th</sup> February 1994 why did he not take action to have the transfer cancelled? Further, the Appellant did not request to be shown the document of transfer of the plot to the 1<sup>st</sup> Respondent.
41. It would also appear that the Appellant had access to documents contained in the 2<sup>nd</sup> Respondent's records since he produced in evidence minutes of the ordinary Works, Town Panning and Marketing Committee meeting held on 23<sup>rd</sup> September, 1993 at the Mwingi Urban hall and where the transfer of plot number 15A to the 1<sup>st</sup> Respondent was approved. The Appellant did not give any reason as to why at the time he obtained the minutes he did not also obtain any other documents he may have required. Further, the Appellant did not show that he made any formal request to be supplied with the documents of subdivision of the plot in question and transfer of the subdivision thereof. Indeed, the Appellant at some point during the pendency of this appeal made an application dated 24<sup>th</sup> January, 2018 seeking to adduce additional evidence to wit the report of one E. Kenga government document examiner dated 14<sup>th</sup> April 2008. The court in its ruling dated 31<sup>st</sup> July 2018 observed as follows;

“If indeed the Appellant had complained to the police about the alleged forgery of his signature, the police had obtained his specimens and known handwriting and signature, then due diligence required the Appellant to request the court to compel the document examiner to testify. He never did that but instead proceeded with his case without the benefit of the document examiner.”
42. The opportunity was also available to the Appellant to have the 2<sup>nd</sup> Respondent who has custody of the documents relating to ownership of the suit plots summoned by the court to produce any documents relevant to prove his case.
43. I do agree with the court's findings that the Appellant failed to exercise due diligence in seeking the court's assistance in obtaining evidence he may have required to prove his case taking into account that the onus was always on him to prove that which he alleged.
44. The trial court found that “the evidence by the Plaintiff on the alleged fraud and the submission by the Plaintiff's Counsel that the 1<sup>st</sup> Defendant colluded with the 2<sup>nd</sup> Defendant are mere allegations which have not been supported by conclusive material facts.”
45. The trial court further found that the evidence adduced by the Appellant and his witnesses fell short of the required standard to prove his claim and in the circumstances proceeded to dismiss the suit.
46. On the anomalies raised by counsel for the Appellant on whether the 1<sup>st</sup> Respondent was claiming plot number 15A or 15B, the Appellant pointed to paragraph 9 of the plaint where it was stated that the 1<sup>st</sup> Respondent through fraud and stealth had plot number 15A registered in his name in 1993. The Appellant further stated that in the year 2000, the 1<sup>st</sup> Respondent laid a claim to parcel No. 15B



and started some construction on a part of the said plot. This construction seems to be what triggered this suit.

47. It is noted that even though the 1<sup>st</sup> Respondent in the initial defence had claimed that plot number 15B belonged to him, he did amend to state the correct position that the plot transferred to him by the Appellant was plot number 15A. This position is supported by the Appellant's pleadings, and various documents to wit the letter from Mwingi Urban Council dated 28<sup>th</sup> December 1993, the Appellant's letter dated 20<sup>th</sup> February 1994 to the clerk Mwingi Urban County, minutes of the Ordinary Works, Town Planning and Markets Committee meeting held on 23<sup>rd</sup> September, 1993 all of which confirmed the plot that was transferred to the 1<sup>st</sup> Respondent was plot number 15A and not 15B.
48. The Court is satisfied from the totality of the evidence on record that the plot transferred to the 1<sup>st</sup> Respondent was plot number 15A and not 15B.
49. From the foregoing, the court finds that the Appellant did not prove to the required legal standard his claim before the trial court that the subdivision of plot number 15 Mwingi Township into two plots numbers 15A and 15B and the subsequent transfer of plot number 15A to the 1<sup>st</sup> Respondent was obtained wrongfully through stealth and fraud and collusion on the part of the Respondents.
50. The court further finds that the 1<sup>st</sup> Respondent proved his counterclaim to the extent that was allowed by the trial court in that he was the owner of plot number 15A and he was entitled to an order granting him vacant possession of the said plot. The court finds no reason to interfere with the trial court judgement and makes the following final order;
  1. The appeal is found to have no merit and the same is hereby dismissed.
  2. Costs of the appeal are awarded to the 1<sup>st</sup> Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court and virtually in the presence of;

Muigai for the Appellant

B. M. Musyoki for 1<sup>st</sup> Respondent

