



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Tiras v Kanampiu (Environment and Land Appeal E016 of 2021)  
[2022] KEELC 117 (KLR) (7 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 117 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

**CK YANO, J**

**JUNE 7, 2022**

**BETWEEN**

**KELLEN KEERU TIRAS ..... APPELLANT**

**AND**

**TIMOTHY MICHENI KANAMPIU ..... RESPONDENT**

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

**JUDGMENT**

**A. Introduction**

1. The appellant Kellen Keeru Tiras filed this appeal against the judgement and decree of the Chief Magistrate (Hon. J.M Njoroge 2021 delivered on 26/11/2021) and set out the following 6 grounds of appeal:
  - i. That the learned Trial Magistrate erred in Law and fact by finding that the deceased and his wife sought to sell the portion of land L. R Nos. Mwimbi/chogoria/2726 and 2728 to the respondents despite having found that the respondent did not produce any sale of land agreement to the respondent or reveal who the witnesses were.
  - ii. That the Learned Trial Magistrate erred in Law and fact by finding that the sale of land L. R Nos. Mwimbi/chogoria/2726 and 2728 to the respondent was backed by evidence by members of the Land Control Board when no application to the relevant Land Control and consent of the Land Control Board were produced in court.
  - iii. That the Learned Trial Magistrate erred in Law and fact by failing to find that no transfer forms duly signed by the appellant's deceased father were produced by the respondent and therefore there was no evidence at all to support the sale of any land to the respondent



- iv. That the Learned Trial Magistrate further erred in Law and fact in that he failed to find that the respondent fraudulently acquired the parcel of Land L.R Nos. Mwimbi/chogoria/2726 and 2728 and the registration thereof was tainted with fraud and ought to have been cancelled and the two parcels to revert in the names of the appellant.
  - v. That the Learned Trial Magistrate erred in Law and fact by awarding the respondent the two parcels of land L.R Nos. Mwimbi/chogoria/2726 and 2728 to the respondent when there was no prayer or counterclaim by the respondent to retain his ownership of the two parcels of land.
  - vi. That the Learned Trial Chief Magistrate erred in Law and fact by awarding the appellant ½ (half) the costs.
2. The Appellant prays to this Honourable court for the orders that the appeal herein be allowed, that part of the judgement and decree in Chuka CMCC No. 118 of 2018 awarding the respondent part of the land L. R Nos. Mwimbi/chogoria/2726 and 2728 be set aside and the two parcels be awarded to the appellant and the costs of this appeal and the lower court be borne by the respondent.

### **Background of the Appeal**

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



- ii. An order that the respondent to transfer LR No. Mwimbi/chogoria/ 2726, 2727, 2728, 2729 and 2730 to the Appellant's father and in default the Executive Officer of the court do sign all the requisite transfer documents to effect such transfer of the land to the Appellant's father.
  - iii. An order that the land Register for the said parcels be rectified by cancelling the name of the respondent therefrom and registering the same in the Appellant's father's name.
  - iv. Costs of the suit and interest at court rates.
8. The Respondent in his defence dated 2<sup>nd</sup> July, 2004 denied the claim and averred that the registration of the suit parcels of land were lawfully carried out with the full participation of the Appellant's father. The Respondent denied that the registrations were fraudulent, illegal and unlawful as alleged.
9. After hearing evidence from both the Appellant and the Respondent, the subordinate court allowed the Appellant's suit in the following terms:
- a) A declaration that L.R. Nos. Mwimbi/Chogoria/2727, 2729 and 2730 belong to the Plaintiff (Appellant).
  - b) A declaration that LR Nos. Mwimbi/Chogoria/2726 and 2728 belong to the Defendant (Respondent).
  - c) An order that the Defendant (Respondent) to transfer LR. Mwimbi/Chogoria/2727, 2729 and 2730 to the Plaintiff (Appellant) and in default the Executive Officer of the court do sign all the requisite transfer documents to effect the said transfer to the Plaintiff (appellant).
  - d) That the Lands Register for the parcels 2727, 2729 and 2730 be cancelled in the name of the Defendant (Respondent) and replaced with the name of the Plaintiff (Appellant).
  - e) The Plaintiff (Appellant) is awarded ½ the costs.
10. In his judgment, the trial magistrate considered that the parent parcel Mwimbi/chogoria/1591 was initially registered in the name of the Appellant's father, the late Tilas M'Bore M'Raiji, but was later subdivided into 5 parcels of land Nos. 2726 – 2730 and four (4) of the portions were transferred into the Respondent's name. The trial magistrate noted that the Respondent claimed to have bought the portions of land over a long period of time. The learned magistrate however, observed that the Respondent did not reveal the time or period that the transaction took place, nor did he explain the consideration or purchase price and when and how the same was paid. The trial court further observed that the Respondent did not produce a sale agreement or reveal who the witnesses were.
11. The learned trial magistrate considered the provisions of section 3(3) of the Law of Contract Act, as held in *James Waitthaka Kamau and 3 others –vs- Stanley Njoroge* (NBI) HCCC No. 6656 of 1991 thus:
- “But under section 3(3) of the Law of Contract Act, for any sale and purchase of land to be effective, there should be a note or memoranda in writing, giving names of the parties, the purchase price, parties signature and that of witnesses...”
12. The learned magistrate further noted that the Appellant stated that the family of their deceased father was not involved and were not aware of the said transactions. That this was ancestral land held in trust and hence was not available for sale, unless the entire family of the deceased was involved. The trial court further noted that the members of the Land Control Board contradicted themselves as to the land that was transferred. The trial court however found that the evidence adduced supported the fact



that the deceased had sought to sell two plots now portions Nos. 2726 and 2728 which are registered in the name of the Respondent. The court further found that the registration of the rest of the portions were not backed by the evidence adduced by members of the Land Control Board as there was no record of any meeting.

13. The appeal was canvassed by way of written submissions but only the Appellant filed her submissions on 9<sup>th</sup> March, 2022. No submissions were filed by the Respondent despite the fact that both parties were represented on 7.2.2022 when directions were given by the court on the filing of submissions.

### **The Appellant's Submissions**

14. On ground 1 of the Appeal the Appellant submitted that the respondent did not adduce any evidence to support his allegation that he bought any land from the Appellant's deceased father. The Appellant further submitted that the respondent was not able to produce any agreement for sale of land as required by the law.
15. The Appellant further submitted that it was erroneous on the part of the Learned Trial Magistrate to find that the respondent lawfully acquired 2 (two) parcels of land to wit L.R No. Mwimbi/chogoria/2726 and 2728 while at the same time the court ordered the respondent to return the other parcels of land to the appellant.
16. The Appellant submitted that the court erred by awarding the respondent the two parcels of land when the respondent did not file any counterclaim in court and relied on the holding by the Court of Appeal in the case of *John Olorashar Ole Ngiru v/s Ochoba Bidundu & James Ogabi* CA No.87 of 2019 Kisumu.
17. On ground 2, the Appellant has submitted that before the lower court, the respondent did not produce any application to the Land Control Board and the consent from the land Control Board. It is the Appellant's submission that the acquisition of the two properties by the respondent was not backed by any evidence from the Land Control Board and that pursuant to the Provisions of Section 6 of the Land Control Act the alleged transaction between the appellant's deceased father and the respondent, if any, was and is therefore a nullity in law. The Appellant has urged the court to adopt the holding by the Court of Appeal in the case of *Peter Waweru Waititu vs Cyrus J. Karanja* CA No.257 of 2001.
18. The Appellant further submitted that the respondent did not produce any transfer form duly signed by the appellant's deceased father and therefore submitted that there was no sale of any land to the respondent and urged the court to allow ground 3 of the appeal.
19. Regarding ground 4 of the appeal the appellant submitted that the respondent obtained the two parcels of land through fraudulent means, hence it was erroneous for the trial court to find that the respondent was entitled to the said two parcels of land, the court having found that the respondent ought to return the other three parcels of land to the appellant. The Appellant therefore urged the court to allow ground 4 of the appeal and award the parcels of land L.R Nos. Mwimbi/chogoria/2726 and 2728 to the appellant.
20. On ground 5 of the Appeal, the Appellant submitted that the respondent did not file any counterclaim in the lower court and therefore there was no basis to award the two parcels of the land to the respondent.
21. The Appellant further submitted that the lower court having entered judgement in favour of the appellant over the other three parcels of land and the respondent having failed to file any counterclaim, the court should find that the appellant was entitled to get full costs of the suit as costs follow the event and that there were no compelling reasons to deny the successful party costs of the suit.



22. The Appellant urged the Honourable court to allow the appeal herein, that part of the judgement and decree in Chuka CMCC No.118 of 2018 awarding the respondent part of the land L.R Nos. Mwimbi/chogoria/2726 and 2728 be set aside and the two parcels be awarded to the appellant and that the costs of the appeal and the lower court be borne by the respondent.

### **Analysis and Determination**

23. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the courts' 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. There are only two issues I find call for my consideration – whether the learned magistrate reached the correct conclusions that parcels LR Nos. Mwimbi/Chogoria/2726 and 2728 belong to the Respondent and the issue of costs.
24. With regard to the first issue, the Appellant has submitted that the learned trial magistrate erred in concluding that the Respondent lawfully acquired the said two parcels of land when there was no sufficient evidence adduced to support the finding and when the Respondent did not file a counter claim with respect to the said parcels. Whenever a court of law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the law, and specifically the provisions of section 3(3) of the Law of Contract Act which reads as follows:
- “No suit shall be brought upon a contract for the disposition of an interest in land unless –  
(i) is in writing and is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act(Cap 526) nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
25. The court has carefully perused the record and it is clear that there was no sale agreement produced by the Respondent as an exhibit. However, the Respondent's evidence was that he was sold the parcels Nos. Mwimbi/Chogoria/2626, 2627, 2628 and 2629 by the Appellant's deceased father over a long period of time. The Respondent further testified that he was sold parcel No. 2627 by one Ephantus Gitonga who is a son to the deceased. He stated that they attended Land Control Board where the deceased and his wife were present. Whereas the record indicates that the respondent was charged with a criminal case, the evidence on record confirms that he was acquitted, and there was no appeal preferred, and therefore the acquittal stood.
26. In his evidence-in-chief, the Appellant testified that he did not see a sale agreement with the Respondent and therefore did not know how the Respondent got title deeds in respect of the suit properties. However, during cross-examination by Mr. Muthomi, advocate for the Respondent, the Appellant stated that her mother, Irene Nkunga in her evidence stated that the deceased sold land to the Respondent. She further stated that in the criminal case trial, the Assistant Chief stated that the Appellant's brother and deceased father appeared in his office and confirmed that the deceased had sold the land, and were given a letter to proceed to the Land Control Board. The appellant further stated that Murithi M'Ragwa confirmed that the parties appeared before the Land Control Board. Of course the Appellant did not agree with that.



27. Whereas the certificate of titles in the name of the Respondent are to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per section 26 of the Land Registration Act, the material and evidence on record support the fact that the deceased sold two portions Nos. 2726 and 2628 which are registered in the Respondent's name. However, and as rightly observed by the trial magistrate, the rest of the portions were not backed by any evidence. Whereas the Appellant's case is that the Respondent fraudulently acquired parcel LR. Nos. Mwimbi/Chogoria/2726 and 2728, the evidence on record confirm otherwise, that the deceased sold two plots to the Respondent. To succeed in a claim of fraud, a party not only need to plead but also to adduce watertight evidence upon which the court would make its finding. It is also settled law that fraud is a very serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR; *R.G. Patel v Lalji MJakani cited in the case of Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 Others* [2013] eKLR and *Central Bank of Kenya v Trust Bank Ltd & 4 Others* [1996] eKLR.
28. In the instant case, the Appellant's submission was that the two parcels of land were acquired fraudulently and that the trial court erred in finding that the respondent was entitled to retain the same but return the three other parcels. However, from the material on record and in particular what was stated by the appellant's mother and the Assistant Chief the court finds that there was evidence tendered to support the acquisition of the two parcels by the Respondent. The Appellant in my view has failed to prove the alleged fraud against the Respondent. There was no sufficient evidence tendered to the satisfaction of the court to prove the alleged fraud against the Respondent. In those circumstances, the learned magistrate reached the correct conclusion that the two parcels of land LR NOS. Mwimbi/chogoria/2726 and 2728 belonged to the Respondent.
29. On the award of ½ (half) costs to the Appellant, ordinarily, costs normally follow the event. However, section 27 of the Civil Procedure Act provides that costs are awarded at the discretion of the court. In this case, it is clear from the judgment that the Appellant only succeeded partly. This is because two parcels were found to rightly belong to the Respondent. Therefore, I do find that the ½ (half) costs awarded by the trial court was proper in the circumstance and I find no compelling reason to interfere with the same.
30. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same.
31. In the result, I find no merit in the Appellant's appeal and the same is dismissed. Since the Respondent did not file submissions as earlier stated, I order that each party will bear their own costs of the appeal.
32. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 7<sup>TH</sup> DAY OF JUNE 2022**

In The Presence of:

CA: Ann

Muriithi h/b for Muthomi for Respondent

Mutuma Kithinji h/b for Kiogora Ariithi for Appellant

**C. K. YANO,**



**JUDGE.**

