



**Kago v Kago & another (Environment and Land Appeal
E023 of 2024) [2025] KEELC 3899 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E023 OF 2024**

**MAO ODENY, J
MAY 20, 2025**

BETWEEN

DAVID KAGUNYI KAGO APPELLANT

AND

JACK MBURU KAGO 1ST RESPONDENT

LAND REGISTRAR NAKURU 2ND RESPONDENT

*(Being an appeal from the Judgment/Decree of Hon. K. Kibelion, Principal Magistrate,
Nakuru, delivered on 15th May, 2024 in Nakuru CM ELC No E31 of 2021)*

JUDGMENT

1. This appeal arises from the Judgment and Decree by Hon. K. Kibelion, Principal Magistrate, Nakuru, delivered on 15th May, 2024 in Nakuru CM ELC No E31 of 2021. The Appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 17th May, 2024 and listed the following grounds:
 1. The Learned trial Magistrate erred in law and fact when he failed to fully consider the Appellant evidence on title deed ownership.
 2. The learned trial Magistrate erred in law and fact when he failed to address glaring facts of fraud on the green card.
 3. The learned trial Magistrate erred in law and fact when he totally ignored the issue of a missing parcel file from the 2nd Respondent.
 4. The learned trial magistrate erred in law and fact when he failed to consider the clandestine manner in which the land in question was transferred to the 1st Respondent.
 5. The Learned trial magistrate ignored the submission of the Appellant.



2. The Appellant prayed for the following order:
 - a. That the judgment of the Honourable Magistrate delivered on 15th May, 2024 in Nakuru Elc be set aside and the Appellant's appeal be allowed.
3. The Appellant had sued the Respondent in the lower court vide a Plaint dated 22nd February, 2021 which was subsequently amended on 12th January, 2022 and sought the following orders:
 - a. A permanent injunction do issue to restrict the 1st Defendant herein either by himself, his servants and/or agents from encroaching, alienating and/or disposing off all that parcel of land known as Njoro/Njoro Block1/638 (Kikapu).
 - b. An order of cancellation of title deed in relation to land parcel number Njoro/Njoro Block1/638 (Kikapu) and the 2nd Defendant be compelled to rectify its land register to read the Plaintiff's names.
 - c. Costs of the suit.
4. The suit was heard and determined vide judgment dated 15th May, 2024 where the court dismissed the Appellant's suit which led to the Appellant filing the present Appeal.

Appellant's Submissions

5. Counsel for the Appellant filed submission dated 20th November, 2024 and submitted that the Appellant's case in the subordinate court was that he neither signed any transfer forms nor appeared before a Land Control Board therefore the title in question should revert back to the Appellant since the parties are siblings, they will talk and agree on the way forward. Counsel further submitted that the purported sale agreement was done on 17th June 2011 during the pendency of the Succession Cause.
6. Mr. Simiyu submitted that the agreement did not specify the suit property that was being sold to the 1st Respondent and further that the 6th and 7th clauses indicated that in case of breach, the party in breach was to refund the money. Counsel submitted that if the Appellant had refused to sign the transfer document, then it was upon the 1st Respondent to sue for specific performance.
7. According to counsel, it was doubtful whether the parties appeared before the Land Control Board for a consent and prayed that the title issued to the 1st Respondent be cancelled as it was obtained by fraud.
8. Counsel further submitted that illegal contracts are not enforceable in a court of law and relied on Section 26 (1) a & b of the [Land Registration Act](#) and the case of Estate of Isaac Kaburu Maret (Deceased) 2017 eKLR.

1st Respondent's Submissions

9. Counsel for the 1st Respondent filed submissions dated 5th December, 2024 and submitted that the suit parcel of land is a subdivision of land parcel number Njoro/Njoro Block1/57 which was originally owned by the Appellant and Respondent's mother. Counsel submitted that upon the demise of the registered owner, a Succession Cause was instituted where the Respondent was appointed as an administrator and a grant was subsequently confirmed on 8th June, 2011 whereby 1.83 acres devolved to the Appellant from land parcel number Njoro/Njoro Block1/57.
10. Counsel submitted that vide an agreement dated 17th June 2011, the Appellant sold his portion of 1.83 acres to the Respondent at a consideration of Ksh 150,000/= of which the Appellant acknowledged the existence of the agreement vide a letter dated 6th October, 2020 addressed to the Respondent.



Counsel relied on the case of Speaker of Kisii County Assembly v James Omwanza Nyaoga [2016] eKLR and submitted that the Trial Magistrate was right in holding that the agreement in question was not invalidated by the Appellant's evidence.

11. Mr. Mukira also submitted that a transfer by transmission was effected in the name of the Appellant and by that time, he had already sold the land. It was counsel's submission that the same advocate who filed the Succession Cause is the one who did the transfer and the agreement which were hand written clearly stated that the balance of the purchase price was paid.
12. Counsel also submitted that the green card indicates the entries, which confirm that there was a transfer by transmission to the Appellant and later a direct transfer to the Respondent. Further that the land Registrar gave evidence in the lower court and counsel had an opportunity to cross examine the witness. Counsel referred the court to paragraphs 90 – 93 of the Record of Appeal where the Appellant acknowledged signing the documents. Further the court rightly held that the Appellant was being economical with the truth and that there was no evidence to warrant the reversal of the title.
13. Mr. Mukira submitted that the Respondent has been in peaceful occupation of the suit land and that the Appellant never raised an issue with the Respondent's occupation.
14. Counsel further submitted that the transfer of the suit parcel of land was proper and the Appellant has failed to prove any fraud on the said transaction and relied on the cases: Kinyanjui Kamau v George Kamau [2015] eKLR, Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR and Eviline Kariku v M'Chabari Karimi [2022] eKLR. Counsel urged the court to dismiss the appeal with costs.

Analysis And Determination

15. The issue for determination is whether the Trial Magistrate erred in law and fact in finding that the transaction was not marred by fraud as alleged by the Appellant, whether the Appeal has merit.
16. The court is aware of the duty of the court being a first appeal as was enunciated in the case of Selle and another v Associated Motor Board Company and Others [1968] EA 123, where the court held as follows:

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

17. The Appellant alleged in the lower court that the Respondent transferred the suit property fraudulently without following the laid down procedures. He alleged that he neither signed the documents of transfer nor attended the Land Control Board. It was the Appellant's case that the sum he received from the 1st Respondent was for leasing of the suit parcel and not for sale of the same.
18. From the Record of Appeal and the evidence adduced in the lower court together with the documents produced by the parties, it is evident that the Appellant and the Respondents are siblings and that the suit land belonged to their late mother whom they inherited the same in equal shares vide transmission. The Appellant acknowledged that they entered into an agreement for sale of his portion to the Respondent dated 17th June 2011 vide a letter dated 6th October 2020. The Appellant did not dispute the existence of this agreement in the lower court.



19. The Appellant submitted that the parties being siblings, the title should be reversed or cancelled to enable them to talk on the way forward. Counsel further submitted that the Respondent should have opted to sue for specific performance if the Appellant had refused to sign the documents for transfer. The respondent could not have used the suggested option as the Appellant had willingly sold his portion, and acknowledged the sale by signing the requisite documents together with a letter dated 6th October 2020.
20. This is a case where the Appellant has an afterthought after the sale and transfer of the land for a consideration which he acknowledged to have received. The Land Registrar who is the custodian of land documents gave evidence and confirmed that the processes for transfer by transmission were followed and that there was no fraud in the transaction. The Appellant had an opportunity to cross-examine on the authenticity of the documents including the entries on the green card which is a reflection of the title.
21. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the case of *Vijay Morjaria v Nansingh, Madhusingh Darbar & another* [2000] eKLR held thus:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”
22. The Appellant had specifically pleaded the particulars of fraud in the amended plaint dated 12th January, 2022 and alleged that the Respondent has forged the documents for registration as he never signed them. It is not enough to throw in some particulars of fraud without proof of substantiating the same. If the Appellant was sure that he did not sign the documents, he should have subjected the documents to a forensic examiner to compare his signature and the one on the documents to prove forgery or whether it was signed by one and the same person. Without such evidence, it is the Appellant’s word against the Respondent’s.
23. The Trial court (Hon K. Kibelion- Principal Magistrate) considered the testimony of the Land Registrar and found that fraud had not been proved and further that the Appellant did not contest the sale agreement.
24. In the case of *Narriman A. Khan v Ramadhan Hamisi & 2 others* [2018] eKLR, at paragraph 14, the court held as follows:

“The Defendants questioned the validity of the Plaintiff’s titles. They however failed to adduce any evidence to contradict the evidence adduced by the Plaintiff and neither did they adduce any evidence to support their contention that the Plaintiff illegally acquired the suit titles through misrepresentation, forgery and trickery as alleged. I thus reach the finding that indeed the Plaintiff is legally registered as the owner of the suit properties.”
25. Similarly in the case of *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs, the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not



be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

26. The Appellant did not discharge the burden of proof to the allegation of fraud and hence I do not find any plausible reason to interfere with the Trial court’s decision as the Principal Magistrate properly exercised his mind and made a just determination based on the facts presented to him. The sale agreement, which was not disputed, was witnessed by the 1st Respondent’s wife and the burden was upon him to prove the same was fraudulent which was not done. The Appellant’s wife was also not called as a witness to support the allegation of fraud.
27. I have considered the Record of Appeal, the submissions by counsel and find that the Appeal lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MAY 2025.

M. A. ODENY

JUDGE

