



**Gakuro & 2 others v Wanjau (Environment and Land Appeal
E003 of 2023) [2025] KEELC 3855 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

JO OLOLA, J

MAY 15, 2025

BETWEEN

DAVID KIBERE GAKURO 1ST APPELLANT

JOSEPH GAKURO KIBERE 2ND APPELLANT

CATHERINE NGIMA KIBERE 3RD APPELLANT

AND

MARTIN WAIGWA WANJAU RESPONDENT

JUDGMENT

Background

1. This is an Appeal arising from the Judgment of the Honorable M. Okuche, SPM delivered on 27th July, 2023 in Nyeri MELC Case No. 115 of 2018. The suit was initially filed in this court in the year 2015 before it was transferred to the Lower Court.
2. By a Plaint dated 2nd February, 2015, Martin Waigwa Wanjau (the Respondent herein) sought judgment against the three (3) Appellants as follows:-
 1. A permanent injunction restraining the Defendants their agents, servants or anyone claiming under them from trespassing (or) entering into Naromoru/Naromoru/Kieni East Block 1/205 or in any other way interfering with the Plaintiff's quiet possession of the Plaintiff's parcel of land Naromoru/Naromoru/Kieni East Block 1/205;
 2. General damages for trespass; and
 3. Any other order that the Court may deem fit to grant.
3. The basis for those prayers was the respondent's contention that at all material times he was the registered owner of the parcel of land known as Naromoru/Naromoru/Kieni East Block 1/205



while the 1st Appellant is the owner of Naromoru/Naromoru/Kieni East Block 1/206. It was the Respondent's case that the 2nd Appellant in his own capacity and also as an agent of the 1st Appellant who is his father had threatened and warned the Respondent's agents from working or utilizing the Respondent's parcel of land.

4. Further, it was the Respondent's case that in the month of September, 2014, the 1st, 2nd and 3rd Appellants demolished a footbridge within the Respondent's parcel of land and also boundary posts lying between the Respondent's and the 1st Appellant's parcel of land and proceeded to erect other boundary posts blocking access to the Respondent's parcel of land from the main road.
5. The three Appellants filed a joint Statement of Defence dated 7th April, 2015 wherein they averred that they had leased their whole parcel of land and had never occupied the same. The Appellants further denied that the 2nd Appellant had threatened or warned the Respondent's agents or servants from working on or utilizing the suit property. They further denied that they had demolished any foot bridge on the Respondent's land.
6. By way of a Counterclaim, the Appellants averred that the original proprietor of the suit property one Julius Gatimu Mbarire had fraudulently caused a portion of their parcel of land to be curved off and to be allocated as part of the suit property. Accordingly, the Appellants prayed for orders as follows:
 1. That Julius Gatimu Mbarire acquired the land fraudulently;
 2. That the registration of Julius Gatimu Mbarire as the owner of the suit land and the subsequent transfer of the suit land by the said Julius Gatimu Mbarire to the Plaintiff be declared null and void and the same be ordered to be cancelled by the Land Registrar Nyeri;
 3. That the suit land be registered in the name of the 1st Defendant;
 4. Costs of this suit and counterclaim be awarded to the Defendants; and
 5. Any further or better relief the Honourable Court may deem fit to grant.
7. Having heard the parties and by the Judgment delivered on 27th July, 2023 aforesaid, the Learned Senior Principal Magistrate ordered that:
 - a. The Counter Claim is dismissed with costs to the Plaintiff;
 - b. The Interested Party is awarded half the costs of the Counterclaim;
 - c. A permanent order of injunction do issue restraining the Defendants, their agents servants or anyone claiming under them from trespassing, entering into Narumoru/ Narumoru/Kieni East Block 1/205 or in any manner interfering with the Plaintiff's quiet possession of the Plaintiff's parcel of land Narumoru/ Narumoru/Kieni East Block 1/205; and
 - d. General damages for trespass of Kshs Two Hundred Thousand to the Plaintiff.
8. Aggrieved by the said determination, the Appellants who were the Defendant in the proceedings before the Lower Court moved to this court and lodged a Memorandum of Appeal dated 22nd August, 2023 urging this court to set aside the entire judgment on some six (6) grounds listed as follows:-
 1. The Learned Trial Magistrate failed to address his mind to the pleadings on record and evidence by the Appellants;
 2. The Learned Trial Magistrate erred in law and facts by failing to consider and evaluate the entire evidence as well as supporting documents presented by the appellants and or their counsel;



3. The Learned Trial Magistrate erred in law and fact in failing to consider the weight of the evidence by the Appellants and ended up with a wrong finding;
 4. The Learned Trial Magistrate erred in law and fact by failing to find that the appellants had proved to the required standards that the interested party had obtained the title deed subject of the suit by fraud and thus could not pass a good title to the Respondent;
 5. The Learned Trial Magistrate erred in law and fact by failing to appreciate the weight of the evidence presented by the Appellant and thus ending up with wrong findings of dismissing the Appellant's counterclaim; and
 6. The decision of the trial Court was against the weight of evidence
9. As it were, the duty of this court as the first appellate court is to re-evaluate the evidence which was adduced before the subordinate court both on the facts and the law and to come to its own conclusion bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses first hand. [See *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123].
 10. I have accordingly carefully perused and considered the Record of Appeal and the Judgement which is the subject of this Appeal. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
 11. In his suit in the Lower Court, the Respondent had sought an order of a permanent injunction restraining the three (3) Appellants herein, their servants and/or agents from trespassing upon and/or entering the parcel of land known as LR. No. Naromoru/Naromoru/Kieni East Block 1/205 (the suit property). The Respondent had also sought for an order of general damages for trespass against the Appellants.
 12. It was the Respondent's case that the Appellants who own an adjacent parcel of land to the suit property had threatened and warned the Respondent's workers from working on or utilizing the suit property. The Respondent further accused the Appellants of demolishing a footbridge and boundary posts on the suit property and of erecting other boundary posts and thereby blocking any access to the Respondent's parcel of land.
 13. In their joint Statement of Defence and Counterclaim, the Appellants denied that they had trespassed onto the suit property. the Defendants stated that they had leased out their parcel of land number Naromoru/Naromoru/Kieni East Block 1/206 to various persons and that they had not occupied any part of the said piece of land.
 14. While admitting that they are a couple and their son, the Appellants denied that the 2nd Appellant had threatened or warned the Plaintiff's servants from working and/or utilizing the suit property.
 15. By their counterclaim, the Appellants accused the Plaintiff's predecessor in title Julius Gatimu Mbarire who was subsequently enjoined in the suit as an Interested Party of fraudulently causing a portion of the Appellants' parcel of land measuring 3.5 acres to be carved off from their land and to create the suit property which was thereafter registered in the Interested Party's name.
 16. The Appellants asserted that due to the fraud committed by the Interested Party, the sale and transfer of the suit land to the Respondent should be rendered null and void and the registration of the Interested Party as the owner thereof be cancelled for the suit land to be reverted to the name of the 1st Appellant.



17. The Appellants subsequently sought leave which was granted to enjoin the Interested Party to the suit. In his response to the Defence and Counterclaim, the Interested Party stated that the suit property was registered in his name on 16th May, 1989 and that he sold the same to the Respondent in June, 2014.
18. Having heard the parties, the Learned Trial Magistrate proceeded to dismiss the Appellants' Counterclaim and issued an order of permanent injunction restraining the Appellants from trespassing into or in any manner interfering with the suit property. In addition, the Appellants were condemned to pay the sum of Kshs. 200,000/= to the Plaintiff as general damages for trespass.
19. The Appellants herein fault the trial Court asserting that the Learned Trial Magistrate failed to address his mind to the pleadings on record and the evidence adduced by the Appellants and hence arrived at the wrong conclusion that the Appellants had failed to prove their Counterclaim.
20. The basis of the Court's conclusion can be discerned from Page 8 and 9 of the Judgment (pages 123 and 124 of the Record) wherein the trial court made a finding as follows:-

“Therefore, can it be said that the first defendant had proved the two particulars of fraud in his counter claim to the requisite standards. The first defendant averred that the interested party was not among the members who had bought land at Gatuamba where the suit land is situated and secondly that he was not allocated the suit by the company. The Interested Party on the other hand avers that he is a member of Kieni East Farmers Company Ltd and that he was allocated the suit land. The Interested Party did produce his list of documents. Amongst these are title deed clearance certificates, which shows he was the registered owner of plot No.205 within Kieni East Farmers Co. Ltd. The clearance certificate gave him the authority to be registered as the owner of this parcel of land. He also produced receipts dated 25/7/1973 and 29/4/1978 in which he paid for his shares within this company. The letter dated 20th March 1989 certified the membership list of Kieni East Farmers Company Ltd. The Interested Party is listed as member No. 205 and the 1st defendant listed as member No.206. The interested party finally produced a title deed to the suit land. Therefore, the allegations by the 1st defendant that the interested party was not a member of this company and that he was allocated the suit land falls on the way side. This court says so because even the 1st defendant relies on the similar documents to prove his ownership of plot Narumoru/ Narumoru/Kieni East Block 1/205....”

21. As it were, it was clear from their pleadings and the testimony at the trial that the Appellants were unhappy with the Respondent's occupation and use of the suit property. The reason for that unhappiness was the fact that the Appellants harbored this belief that the Interested Party who had sold the land had acquired the same through fraud as, according to the Appellants, the portion of land measuring 3.5 acres was supposed to be part and parcel of the portion of land registered in the 1st Appellant's name.
22. Fraud has been defined in Black's Law Dictionary, 11th Edition as:

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”



23. In R.G. Patel –vs- Lalji Makanji (1857) EA 314, the Court of Appeal for East Africa stated that:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

24. Similarly, in Kinyanjui Kamau –vs- George Kamau, (2015) eKLR, the Court stated thus:

“It is trite law that allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo (2008) 1KLR (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 the allegations 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 a case where fraud is alleged it is not enough to simply infer fraud from the facts.”

25. From the material placed before the court it was apparent from a perusal of the proceedings (page 96 to 97 of the Record) that the Interested Party testified as to how he became a member of the land buying company known as Kieni East Farmers Company Ltd. He produced the documents that led to his ownership of the Suit Property. He was issued with a title deed for the suit property on 16th May, 1989 and he only transferred the same to the Respondent upon purchase in the year 2014.

26. As the Learned Trial Magistrate rightfully observed, the Appellants relied on similar documents issued to them by the same Kieni East Farmers Company Ltd. to lay a basis for their title for their adjacent parcel of land. There was no evidence adduced before the court to demonstrate that they were entitled to more land than they were issued with.

27. If indeed any irregularities had occurred at the time of the issuance of the title deeds, the Appellants had not explained why it took them more than 25 years to start claiming the land. Their claim as founded in the Counterclaim was therefore stale and statute-barred in law and without any basis.

28. In the premises I was not persuaded that this Appeal had any merit. The same is dismissed with costs to the Respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 15TH DAY OF MAY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.

b. No Appearance for the Appellant

c. Mr. Kibocho holding brief for Muhoho Advocate for the Respondent

