



Kanyi (Being Represented by Beatrice Ndubala Mutua, Josephine Wairimu Kanyi and Rose Kilolo Peter) v Ngene & 2 others (Environment and Land Appeal E018 of 2022) [2025] KEELC 3836 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E018 OF 2022**

EO OBAGA, J

MAY 15, 2025

BETWEEN

**PETER MUTUA KANYI APPELLANT
BEING REPRESENTED BY BEATRICE NDUBALA MUTUA, JOSEPHINE
WAIRIMU KANYI AND ROSE KILOLO PETER**

AND

**PETER NTHIANI NGENE 1ST RESPONDENT
MALILI RANCH COMPANY 2ND RESPONDENT
JAMES KAMULA MBEVO 3RD RESPONDENT**

*(Being an appeal from the judgment of Hon. F. Makoyo, PM
delivered on 23rd June, 2022 in Kilungu ELC Case No. 95 of 2019)*

JUDGMENT

Introduction

1. The Appellants are the administratrix of the Estate of Peter Mutua Kanyi who had been sued as the 2nd Defendant in the lower court case. The lower court trial magistrate delivered a judgment in favour of the 1st Respondent.
2. The Appellants being aggrieved with the judgment, they filed an appeal to this court in which they raised the following grounds:
 1. That the learned trial magistrate erred in law and in facts by finding that the Plaintiff therein (and now the 1st Respondent) had proved his case to the required standard of proof required in matters touching on fraud.



2. That the learned trial magistrate erred in law and in facts by failing to consider the oral and documentary evidence produced by the 2nd Respondent regarding ownership of the suit property despite being the custodian of ownership records.
3. That the learned trial magistrate erred in law and in fact by failing to consider the oral and documentary evidence of the 2nd Respondent on the authenticity and/or genuineness of the ownership documents produced by the 1st Respondent herein.
4. That the learned trial magistrate erred in law and in fact by failing to consider that the Appellant herein, 2nd and 3rd Respondents had proved their case to the required standard despite producing ownership documents deemed genuine by the Respondent herein.
5. That the learned trial magistrate erred in law and in fact by failing to consider that the plot No. 756 was no longer in existence.
6. That the learned trial magistrate erred in law and in fact by failing to consider the documents produced by the Appellant as genuine and authentic despite the same being supported by the 2nd Respondent herein, the custodian of the ownership records.

Background

3. The 1st Respondent was a member of the 2nd Respondent. By virtue of his membership, he was allocated a commercial plot number 2285 and agricultural plot No. 756. He later entered into a sale agreement with Tom Mogeni Mabururu and Sabina Nelly Aburi in respect of the agricultural plot. When the purchasers went to take possession, they were unable to do so as the plot was being claimed by the 3rd Respondent.
4. The 3rd Respondent had stated that he purchased plot 756 from Peter Mutua Kanyi who was acting as an agent of Muema Mutiso who had been allotted the plot. The 3rd Respondent stated that he went on and processed title for plot 756 which now became LR No. Konza North/Konza North Block 2 (Malili) 1108.

The Appeal

5. The parties were directed to file written submissions in respect of the appeal. The Appellants filed their submissions dated 14th November, 2024. The 1st Respondent filed his submissions dated 27th January, 2025. The 3rd Respondent filed his submissions dated 20th May, 2024.

Appellant's submissions

6. The Appellants submitted that the 1st Respondent did not prove fraud on the part of Peter Mutua Kanyi who sold the suit property to the 3rd Respondent. They submitted that the burden of proving fraud is heavier than in ordinary civil matters where fraud is not pleaded. They relied on the case of *Vijay Morjaria v Nansingh Madhusingh Dabar & another* [2000] EKL.R where it 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.....”



7. The Appellants further relied on the case of Yalwala & 3 others (sued in their capacity as Board of Trustees of Chavakali Yearly Meeting of Friends (Quakers) v Kadenge & 3 others (Environment & Land case 4 of 2021 (2022) KEELC 2510 (KLR) (21 July, 2022) (Judgment) where it was held as follows:

“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.”

8. The Appellant further submitted that the Appellants had adduce sufficient evidence to show that the suit property belonged to Peter Mutua Kanyi before it was sold to the 3rd Respondent. They submitted that cancellations on letters of allotments was not abnormal and that there could be as many cancellations as there are changes of the property in question.

9. On the issue of plot 756, the Appellants submitted that the said plot was non-existent as at the time of filing this suit. What was existing was plot No. Konza North/Konza North Block 2 (Malili)/1108. They therefore submit that no orders could issue on a non-existent plot. They relied on the case of Stephen Mwadoro & 56 others v Alhad Mohamed Hatimy (Environment & Land Case 139 of 2019 [2020] KEELC 855 (KLR) where the court stated as follows:

“There is no need of wasting the court’s time on a case where the order sought is incapable of being granted for the non-existence of the subject matter. I cannot order the Plaintiffs to be registered as owners of the title LR No. 8826 (Original 1312) because that title is non-existent. I am aware that Ms. Chala submitted that this can be amended and that the issue can be handled at the hearing of the main suit. There are about 26 subdivisions with separate titles. No one knows what the Plaintiffs claim out of the 26 subdivisions. It was upon the Plaintiffs to be precise on what they claim and what they have mentioned is a title that does not exist. On the ground that the title being sought does not exist, this application must succeed, and this suit is struck out.”

1st Respondent’s submissions

10. The 1st Respondent submitted that this appeal is res judicata as the 3rd Respondent had filed an appeal against the same decision being Mbevo v Ngele (Environment and Land Appeal No. E012 of 2022) which appeal was dismissed by Justice Muriigi on 13th June, 2024. He submitted that the Appellants should have made efforts to have this appeal consolidated with appeal No. 12 of 2022.

11. The 1st Respondent relied on the case of Gladys Nduku Nthuki v Letshego Limited; Mueni Charles Maingi (intended Plaintiff) 2022 KLR where Justice Odunga (as he then was) quoted the case of Independent Electrol & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR where it was held as follows:

“The rule or doctrine of res judicata serves that salutary aim of brining finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and



brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice”.

12. The 1st Respondent also relied on the case of Petition No. 8 (E010 of 2021) Dina Management Limited v County Government of Mombasa & 5 others where the Supreme Court of Kenya in restating the doctrine of res judicata in Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another motion No. 14 of [2014][2016] eKLR stated as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once legal rights of parties have been judicially determined, such edict stands as conclusive statement as to those rights....[55]. Res judicata entails more than procedural technicality, lies on the plane of a substantive legal concept.”

3rd Respondent’s Submissions

13. The 3rd Respondent reiterated the evidence adduced by the parties in the lower court and submitted on the mandate of this court as the first Appellant court including the jurisdiction of this court. He submitted that the trial magistrate erred in failing to find that plot No. 756 was nonexistent as the evidence adduced in court was that he was the registered owner of Konza North/Konza North Block 2 (Malili)/1108 which was formerly plot 756.
14. The 3rd Respondent also submitted that the trial magistrate erred in holding that he was the 2nd Defendant while he was actually the 3rd Defendant. He further submitted that the trial magistrate erred in law in failing to hold that the 2nd Respondent was the custodian of all allotment and ownership documents and the evidence adduced before the trial court showed that the 1st Respondent never balloted for plot 756 as none was allocated to him. He further submitted that the evidence adduced showed that the allocation of plot 756 had been sanctioned by the 2nd Respondent and that the documents held by the 1st Respondent were forgeries.
15. The 3rd Respondent further submitted that the trial magistrate erred by finding that the 2nd and 3rd Respondent had not proved fraud on the part of the 1st Respondent. He submitted that there was no need to call for evidence of a document examiner as the 2nd Respondent had given evidence that the documents held by the 1st Respondent were forgeries and that as such fraud against the 1st Respondent had been proved.
16. The 3rd Respondent also submitted that the trial magistrate erred in law in shifting the burden of proof to him and the Appellant and 2nd Respondent and that further no fraud had been pleaded and proved as against him. Lastly the 3rd Respondent submitted that the trial magistrate inferred fraud on the part of the Appellant on the ground that he was an official of the 2nd Respondent in that he used his position to perpetuate the fraud. He further submitted that the trial magistrate failed to hold that he was a bonafide purchaser for value without notice of the internal mechanisms of the 2nd Respondent and that he had won a case against the persons to whom the 1st Respondent had sold the suit property.

Analysis and Determination

17. I have carefully considered the record of proceedings in the lower court, the grounds of appeal as well as the submissions by the parties and the authorities cited. As a first appellate court, my duty is to analyze the evidence, re-evaluate it and reach my own conclusions but of course giving allowance that I did



not see the witnesses testifying. The duty of the first appellate court was stated in the case of *Selle & another v Associated Motor Boat Company and others* [1968]IEA 123 where it was stated as follows:

“An appeal to this court from a trial court 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 reconsider the evidence, evaluate itself and drive its own 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. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either 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 on the demeanour of a witness is inconsistent with the evidence in the case generally”.

18. The Appellant raised six grounds in the memorandum of appeal which all deal in the manner the trial magistrate analyzed the evidence adduced. The only issue for determination in this appeal is whether the trial magistrate properly analyzed the evidence adduced before him and whether his findings arising therefrom were correct. The other issue was whether plot No. 756 was non-existent.
19. The Appellant and the 3rd Respondent have submitted that the 1st Respondent did not prove the fraud which was attributed to the Appellant and the 2nd Respondent. The 1st Respondent had pleaded the particulars of fraud as follows:

Particulars of Fraud by the 1st Defendant

- a. Issuing allotment letter to the 2nd Defendant while it knew or ought to have known that the Plaintiff was already issued with documents of ownership.
- b. Knowingly and deliberately double allocating the Plaintiff's suit plot to the 2nd Defendant.
- c. Dispossessing the Plaintiff of the suit plot.
- d. Conniving with the 2nd Plaintiff to defraud the Plaintiff the suit plot.

Particulars of Fraud by the 2nd Defendant

- a. Colluding and conniving with the 1st Defendant to disposes the Plaintiff suit plot.
 - b. Knowingly using forged documents to sell the suit plot to the 3rd Defendant.
 - c. Purporting to sell the Plaintiff's suit plot to the 3rd Defendant while aware that the plot was already allotted to the Plaintiff.
 - d. Obtaining money by falsely presenting to the 3rd Defendant documents which he knew or ought to have known were not valid.
20. The 1st Respondent adduced evidence that he was a member of the 2nd Appellant. He had been allotted a commercial plot No. 2285 and agricultural plot No. 756. The allotment was made on 27th July, 2006. The evidence on record shows that the allotment which was used to sell plot 756 to the 3rd Respondent was issued on 12th September, 2006.
 21. As was held in the case of *Vijay Morjaria (Supra)*, fraud has to be pleaded and proved. The 1st Respondent had pleaded particulars of fraud and went ahead to prove the same. It is clear that the 1st Respondent was the first one to be allotted plot 756. The same plot was purportedly allotted to Muema Mutiso who was a grandson of the Appellant on 12th September, 2006. The allotment letter



- to Muema Mutiso had cancellations which the 2nd Respondent's officials were unable to justify to the satisfaction of the trial magistrate.
22. The ballot which was allegedly issued to Muema Mutiso had his name superimposed on it. There was an earlier name on the ballot. The trial magistrate analyzed all these anomalies in arriving at the conclusion that there was forgery involved.
 23. The Appellant was a director of the 2nd Respondent. It had been pleaded in the Complaint that he colluded with the 2nd Respondent to get forged documents which were used to sell plot 756 to the 3rd Respondent. The 1st Respondent's ballot had no erasures. His allotment too had no alterations.
 24. The 3rd Respondent claimed in the submissions that he was an innocent purchaser for value without notice of any defect concerning plot 756. The 3rd Respondent was not an innocent purchaser. He had been given documents which were suspicious but he did not question them. He did not bother to ascertain whether plot 756 had been allotted to any other person prior to the issuance of documents which were used to sell the land to him. He did not question why the Appellant was selling the plot yet he was not the allottee though there was some suspicious documents purporting to appoint him as an agent of Muema Mutiso.
 25. The 3rd Respondent submitted that the trial magistrate erred by shifting the burden of proof to the Appellant and the 2nd Respondent. The pleadings and the evidence adduced during the trial showed that the Appellant, the 2nd Respondent and the 3rd Respondent were contending that the documents held by the 1st Respondent were forgeries. This being the case, the burden of proof shifted to them to prove that the documents were forged.
 26. The trial magistrate was correct in finding that there was no document examiner available to prove that the chairman's signature on the allotment letter was a forgery or that the ballot was a forgery. The 3rd Respondent cannot therefore be heard to say that there was no need for calling a document examiner as officials of the 2nd Respondent who were the custodians of all the documents had denounced the documents held by the 1st Respondent.
 27. On the issue of res judicata, the 1st Respondent submitted that this appeal is res judicata and that the Appellant should have made efforts to have this appeal consolidated with Appeal No. 12 of 2022 [James Kamula Mbevo v Peter Nthiani Ngele & 2 others]. A look at the grounds raised in Appeal No. 12 of 2022 shows that they were different from what was raised in this appeal. It is not uncommon for parties to file separate appeals arising from the same judgment. What should have happened was for counsel as officers of the court to ask for consolidation of the two appeals which should have been dealt together. A record of proceedings in this appeal show that one of the counsel brought to the attention of the court that this appeal was related to Appeal No. 12 of 2022 which had been set down for mention on 15th February, 2024. When this matter came up for mention on 15th February, 2024 the issue of the two files was not brought up. Instead, one of the advocates stated that he had filed an application to cease acting for the Appellants. The other advocate present was not involved in the present appeal. This explains why consolidation was never done. This appeal is therefore not res judicata.
 28. Contrary to the Appellant's contention in ground one of the memorandum of appeal that the 1st Respondent had not proved his case to the required standards, evidence on record shows that the 1st Respondent was the first one to be allotted plot 756. He had a share certificate showing that he was a member of the 2nd Respondent, he produced an allotment letter and ballot which he was issued by the 2nd Respondent. On the other hand, the Appellant and the 3rd Respondent produced documents which were questionable. The allotment in favour of Muema Mutiso was issued after the 1st Respondent had been issued over the same plot No. 756. There was no share certificate produced to show that Muema



Mutiso was a shareholder of the 2nd Respondent. As has been stated hereinabove, the Appellant, the 2nd and 3rd Respondents did not prove that the documents held by the 1st Respondent were forgeries. This being the case, grounds 1, 2, 3, 4 and 6 must fail.

29. The Appellant submitted that the trial magistrate erred by failing to find that plot No. 756 was non-existent and that no order could be issued based on it. The evidence on record shows that what was before the trial court for determination was on who was the allottee of plot No. 756 and whether the sale of the said plot to the 3rd Respondent was lawful or not and finally whether the 3rd Respondent ought to vacate from plot 756.
30. There is no contention that plot 756 existed. This is the plot which subsequently became Konza North/Konza North Block 2 (Malili)/1108 upon registration. Plot 756 cannot therefore be said to be non-existent. The plot only changed upon registration. I therefore find that ground 5 of the memorandum of appeal is misconceived.

Disposition

31. The trial magistrate correctly analyzed the evidence before him. There is no basis upon which this court can fault his findings. Consequently, I find no merit in this appeal which is dismissed with costs to the 1st Respondent.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MAY, 2025.

In The Presence Of:

Mr. Musyimi for Mr. Mutinda for Appellant.

Mr. Apollo for 1st Respondent.

Ms. Nyabisi for 2nd Respondent.

Court assistant - Steve Musyoki

