



**Mutuku v Mutua (Land Case Appeal E013 of 2024) [2025] KEELC 3914 (KLR)  
(Environment and Land) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3914 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
LAND CASE APPEAL E013 OF 2024**

**EK WABWOTO, J**

**MAY 15, 2025**

**BETWEEN**

**JAPHETH MUTUKU ..... APPELLANT**

**AND**

**MARY SYOLUKA MUTUA ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the judgment of Hon. E. M. Kadima (PM) delivered on 9<sup>th</sup> August 2024 in Taveta Principal Magistrate's Court ELC Case No. E004 of 2024 wherein the learned Magistrate Court dismissed the Appellant's case with costs and interest being awarded to the Respondent herein.
2. The Appellant being aggrieved by the said decision filed this instant appeal vide a Memorandum of Appeal dated 20<sup>th</sup> August 2024. The following grounds were raised on the appeal:-
  - a. That the Honourable Magistrate erred in both fact and law in finding that the Appellant had not proved his case against the weight of the evidence on record.
  - b. That the Honourable Magistrate erred in law and fact in finding that the Appellant's case was brought in bad faith and founded on fraud and deceit.
3. The Appellant sought for the following reliefs in this Appeal; that the judgment delivered on 9<sup>th</sup> August 2024 in the Taveta Principal Magistrate's Court ELC Case No. E004 of 2021 by Hon. E. M. Kadima, Principal Magistrate be set aside and/or varied and that costs of this appeal be borne by the Respondent.
4. The Appeal was contested by the Respondent. Pursuant to the directions issued by this court upon the admission of the appeal; it was directed that the same be canvassed by way of written submissions.



The Appellant filed written submissions dated 9<sup>th</sup> April 2025 while the Respondent filed written submissions dated 22<sup>nd</sup> April 2025 which the court has duly considered.

5. The Court has considered the record of Appeal. The Court has also considered the written submissions filed by the parties and the itemized grounds of appeal. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another –Vs- Associated Motor Boat Co. Ltd & others (1968) EA 123* cited with approval in *China Z Hogxing Construction Company Ltd –Vs- Ann Akeru Sophia (2020) eKLR*.
6. The main issue for consideration is whether this appeal is merited and if the Appellant is deserving of the reliefs sought.
7. It was the Appellant’s case before the trial court that on the 3<sup>rd</sup> day of April 2013 the he purchased unregistered parcel of land measuring approximately (1.312) acres from Moses Mailu at a cost of Kshs. 40,000/= which on the same day paid a down payment of Kshs. 15,000/= and the balance of Kshs. 25,000/= was agreed to be paid in two instalments and on 23<sup>rd</sup> day of July 2013 he paid Kshs. 18,000/= and the final payment of Kshs. 7,000/= was also duly paid.
8. It was also his case that at the time he was purchasing the said parcel of land from Moses Mailu, the same had been leased to the Respondent herein for a period of one year as from 2013 to 2014 at a cost of Kshs. 12,000/=
9. It was also his case that after the expiry of the lease period he told the Respondent to vacate from his parcel of land which she was fully aware that the parcel of land was purchased by him and in fact was a witness to the agreement but she refused/declined to vacate several attempts being made.
10. It was averred that later during the registration process on the 20<sup>th</sup> day of April 2017 the Respondent claimed to be her parcel of land which made the officers to register her ownership to the land.
11. From the record of the appeal, he testified that he entered into an agreement with Moses Mailu who was the 1<sup>st</sup> Defendant before the lower court to purchase the land and he paid by instalments of Kshs. 15,000/=, Kshs. 18,000/= and Kshs. 7,000/=. He also testified that the land did not belong to the Respondent because she had just leased it from Moses.
12. When cross-examined, he stated that the Respondent was the one in occupation of the land since 2012. He also stated on further cross-examination that he was on the land at the time of adjudication and the Surveyor’s recorded the Respondent and his names.
13. On the other hand, the Respondent’s case before the trial court was that he is the one who bought the land from Moses Mailu but the Appellant took advantage of her illiteracy and drew the agreement showing that he was the one who bought the suit property. It was also her case that according to her the Appellant has never been the owner of the suit parcel and that she has occupied the suit land for over 15 years.
14. During the hearing before the subordinate court she testified that Moses Mailu sold her the land for Kshs. 40,000/=. When cross-examined, she stated that she had lived on the land for over 10 years after purchasing the same.
15. The Learned Magistrate upon considering the evidence and the respective parties cases delivered his judgment on 9<sup>th</sup> August 2024 wherein he dismissed the Appellant’s case having found that the same was brought in bad faith and founded on fraud. He also awarded costs and interest to the Respondent.



16. The Appellant in his submissions dated 9<sup>th</sup> April 2025 filed before this court faulted the trial Magistrate for making a finding that the suit was founded on fraud and deceit yet the Respondent had not pleaded any fraud in her defence nor had she filed any Counterclaim.
17. The Respondent on the other hand submitted in her submissions dated 22<sup>nd</sup> April 2025 that the Appellant never brought any evidence to prove his claim. It was also submitted that the Appellant took advantage of the Respondent's age and her illiteracy to defraud the Respondent of the suit property.
  - a. It is an established principle of law that fraud must be specifically pleaded and strictly proved. The Court of Appeal in *Vijay Marjario Vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that: "It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. 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."
18. In *Belmont Finance Corporation Ltd v Williams Furniture Ltd* Buckley L.J said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity."
19. In the instant case, having carefully perused the Respondent's Amended Statement of Defence that was filed before the lower court, it is evident that the Respondent pleaded fraud at paragraph 4(a) to 4(f) of her Statement of Defence. It was pleaded that the matter was reported to the office of the assistant chief office on 12<sup>th</sup> March 2021 and it was established that the land belongs to Respondent. It was also pleaded that the Respondent was the one who bought the suit property from Moses Mailu but the Appellant took advantage of her illiteracy and drew the agreement showing that he was the one who bought the suit property.
20. The evidence that was tendered during trial showed that the Respondent bought the suit property and paid the same in instalments.
21. The evidence that was adduced in court also supported what the Respondent had pleaded and as such the Appellant's contention that the trial court erred in considering aspect of fraud which was not pleaded is without any basis.
22. In view of the foregoing it is the finding of this court that the Appellant failed to prove his case before the lower court to the required standard and the Learned Magistrate arrived at the proper decision in dismissing the Appellant's claim and as such this court cannot overturn the same.
23. In conclusion, it is the finding of this court that the Appellant's appeal lacks merit and the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT VOI THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**E. K. WABWOTO**



## **JUDGE**

In the presence of:-

Mr. Mutinda for the Appellant.

Mr. Mwzighe for Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

