



**Muthee v Macakiage & another (Environment and Land Appeal  
E023 of 2022) [2025] KEELC 6718 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6718 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E023 OF 2022  
TW MURIGI, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**JOHN KIMONA MUTHEE ..... APPELLANT**

**AND**

**TOM ONYANGO MACAKIAGE ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, MAKUENI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Memorandum of Appeal dated 24<sup>th</sup> November 2022, the Appellant appealed against the judgment of Hon. G. Sagero (SRM) delivered on 2<sup>nd</sup> November 2022 in Makueni MCELC No. E037 of 2021 and set out twenty grounds of Appeal.

**Background**

2. The Appellant had sued the Defendants by way of a Plaint dated 22<sup>nd</sup> September, 2021, seeking the following orders: -
  - a. A declaration that the Plaintiff herein is the rightful and legal owner of land parcel known as Konza South/Konza South Block 5 (Konza)/1620.
  - b. An order requiring the Land Registrar, Makueni County, to cancel the 1<sup>st</sup> Defendant's name from the register for land parcel number Konza South/Konza South Block 5 (Konza)/1620 and the Plaintiff's name be reinstated forthwith.
  - c. This Honourable Court be pleased to issue an order of a permanent injunction restraining the Defendant, either by his employees, agents, assignees, and/or servants from trespassing or otherwise interfering in any other way with the Applicant's occupation/possession of land Title number Konza South/Konza South Block 5 (Konza)/1620.



- d. General damages for fraud against the Plaintiff.
  - e. Costs of this suit.
3. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 17<sup>th</sup> January 2022, denying the Plaintiff's claim. He urged the court to dismiss the suit with costs.
  4. In the proceedings before the lower court, the Appellant was the Plaintiff, while the 1<sup>st</sup> Respondent was the 1<sup>st</sup> Defendant. After the trial, the Learned Magistrate delivered his judgment on 2<sup>nd</sup> November 2022 in the following terms:
    - i) The Land Registrar, Makueni, shall forthwith rectify the land register and cause the 1<sup>st</sup> Defendant to be registered as the lawful proprietor of Land Parcel No. Konza South/Konza South Block 5 (Konza)/1620.
    - ii) Costs of the suit to the 1<sup>st</sup> Defendant.
  5. Being aggrieved, the Appellant appealed against the judgment on the following grounds: -
    1. The learned Trial Magistrate erred in law and fact and misdirected himself by dismissing the Plaintiff's case.
    2. The learned Trial Magistrate erred in law and fact and misdirected himself by entering judgment in favour of the 1<sup>st</sup> Defendant, yet there was no counterclaim on record.
    3. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to address the issues of the consideration paid to a third party, being Vincent Muasya, and not the Appellant.
    4. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to analyze the issues raised by the 2<sup>nd</sup> Respondent.
    5. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to address the issue as to whether the Appellant had appointed anyone legally to represent him in any dealings.
    6. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to address the issue as to whether the Appellant benefited in any way from the transaction in regard to the sale of land parcel number Konza South/Konza South Block 5 (Konza) 1620.
    7. The learned Trial Magistrate erred in law and fact and misdirected himself by ignoring the fact that from the Appellant's testimony, he is a man of sound mind and well capable of representing himself in whatever transaction regarding his properties.
    8. The learned Trial Magistrate erred in law and fact and misdirected himself by ignoring the fact that one Vincent Muasya has been previously found culpable in Makueni ELC Case No. E021 of 2021 for misappropriating properties belonging to the Appellant.
    9. The learned Trial Magistrate erred in law and fact and misdirected himself by allowing the 1<sup>st</sup> Respondent to produce additional documents when the Appellant and his witnesses had already testified.
    10. The learned Trial Magistrate erred in law and fact and misdirected himself by allowing the 1<sup>st</sup> Respondent to avail additional witnesses who did not file statements on record.



11. The learned Trial Magistrate erred in law and fact and misdirected himself by allowing the additional witnesses to refer and or produce documents that were not properly on record.
  12. The learned Trial Magistrate erred in law and fact and misdirected himself in allowing the 1<sup>st</sup> Respondent to produce electronic media as evidence without adhering to the provisions of the *Evidence Act*.
  13. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to find that the 1<sup>st</sup> Respondent did not tender any evidence to show that he paid any money to the Appellant.
  14. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to analyze and or question why the 1<sup>st</sup> Respondent was in possession of a title deed of land parcel number Konza South/Konza South Block 5 (Konza) 162, yet he had transfer documents in regard to land parcel number Konza South/Konza South Block 5 (Konza) 1620.
  15. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to address the issue as to why the 1<sup>st</sup> Respondent had never initiated steps to follow up on why he was issued with a title deed in regard to land parcel number Konza South/Konza South Block 5 (Konza) 162.
  16. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to address the issue raised by the 2<sup>nd</sup> Defendant in regard to the erased numeric figure in the green card as regards land parcel number Konza South/Konza South Block 5 (Konza) 162.
  17. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to find that there were issues of fraud perpetrated by the 1<sup>st</sup> Defendant in collusion with some officials from the office of the 2<sup>nd</sup> Defendant.
  18. The learned Trial Magistrate erred in law and fact and misdirected himself by ignoring the records that were available at the office of the 2<sup>nd</sup> Defendant, which show that the Plaintiff is the current registered owner of land parcel number Konza South/Konza South Block 5 (Konza) 1620.
  19. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to consider the applicable case law availed by the Plaintiff.
  20. The learned Trial Magistrate erred in law and fact and misdirected himself by failing to consider the evidence tendered.
6. The Appellant prays for: -
1. That the judgment delivered on 2<sup>nd</sup> November, 2022, and all subsequent orders and decrees be set aside and/or quashed.
  2. That this Honourable Court directs that the Appellant is the registered owner of land Parcel Number Konza South/Konza South Block 5 (Konza) 1620.
  3. That this Honourable Court do issue an order of a permanent injunction restraining the 1<sup>st</sup> Respondent, either by his employees, agents, assigns, and/or servants, from trespassing, or otherwise interfering in any other way, with the Appellant's occupation/possession of land Parcel Number Konza South/Konza South Block 5 (Konza) 1620.
  4. General damages for fraud.



5. That the costs of this Appeal be borne by the 1<sup>st</sup> Respondent in any event.
6. Any other or further relief the court deems fit to grant.
7. The 1<sup>st</sup> Respondent filed a Notice of Grounds for Affirming the Decision dated 15<sup>th</sup> May, 2023. He argued that the decision ought to be affirmed on the following grounds:
  - a. The Appellant relied on a title deed that had been cancelled and failed to surrender it despite having been served by the Land Registrar.
  - b. The Appellant agreed to be represented by Vincent Muasya Kimona who testified that he had instructions to receive the money on behalf Appellant and hence the issue of payments was not raised in the pleadings and in court.
  - c. The counterclaim entered in favour of the 1<sup>st</sup> Respondent though not pleaded was based on evidence and on the law.
  - d. The sale agreement dated 20th July between the Appellant represented by Vincent Muasya Kimona and the 1<sup>st</sup> Respondent is valid as the Appellant conceded its validity in his submissions and it meets also meets the conditions set out in Section 3(3) of the Law of Contract.
  - e. The Appellant did not prove the allegations of fraud against the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent followed due process in obtaining the ownership of the suit property.
  - f. The Appellant did not approach the court with clean hands as he concealed vital information.
8. The 2<sup>nd</sup> Respondent did not participate in the appeal proceedings.

## **The Background**

### **The Plaintiff's Case**

9. The Plaintiff John Kimona Muthee adopted his witness statement dated 22<sup>nd</sup> September 2021 as his evidence in chief. He stated that he is the registered owner of the suit property and denied having sold it to the 1<sup>st</sup> Defendant.
10. On cross-examination, he stated he had never met the 1<sup>st</sup> Defendant. He further testified that the 1<sup>st</sup> Defendant had never visited his home and denied having signed the sale agreement.
11. PW2 Angelina Mutuku, the Plaintiff's daughter, adopted her witness statement as her evidence-in-chief. She testified that she does not know the 1<sup>st</sup> Defendant and has never met him. She further testified that she registered a caution against the suit property in 2018 after discovering that her nephew wanted to sell her father's land.
12. She went on to state that in 2020, a search revealed that the 1<sup>st</sup> Defendant was registered as the owner of the suit property. According to her, their father has poor eyesight and would not sell his land without consulting his family.
13. On cross-examination, she testified that she did not have a letter from the hospital confirming her father's poor eyesight or his inability to walk.
14. PW3 David Mulwa, the Secretary of Konza Ranching and Cooperative Society, confirmed that the Plaintiff is their member and owner of title No. 1620, not title No. 162. He explained that although the 1<sup>st</sup> Defendant was not a member, he had purchased several properties from members of the Society.



15. On cross-examination, he confirmed that there is no land known as title No. 162.

### **The Defence Case**

16. The 1<sup>st</sup> Defendant, Tom Onyango Mackiage, adopted his witness statement dated 17<sup>th</sup> January 2022 as his evidence in chief. He also produced the documents in his list in support of his defence. He informed the court that the Plaintiff sold the suit property to him vide a sale agreement dated 20<sup>th</sup> July 2018.
17. He further testified that the Plaintiff instructed him to transfer the funds to his grandson. He explained that, during the registration process, they discovered another title dated 10/07/2018 registered in the Plaintiff's name. Consequently, the Land Registrar requested the Plaintiff to surrender that title, which led to a new title being issued in his name.
18. He went on to state that sometime in 2020, Angelina called and informed him that he was not the owner of the suit land. Following her complaint, the DCI summoned him and, after conducting an investigation, found no fault on his part.
19. On cross-examination, he stated that he paid a total of Kshs.8.2 million through bank transfer, M-Pesa, and cash to Vincent Kimona. He also confirmed that he did not attend the Land Control Board, as that was the Plaintiff's responsibility.
20. DW2 Vincent Muasya Kimona testified that the Plaintiff is both his adoptive father and biological grandfather. He told the court that his father informed him and his mother of his intention to sell the suit property and requested them to seek potential purchasers, citing his advanced age, plans to construct a house, refurbish his shop, and manage his diet.
21. He further testified that a broker named Peter Musembi introduced them to the 1<sup>st</sup> Defendant. He stated that his father appointed him as a trustee to receive his funds, and they signed an agreement. He also mentioned that the meeting was documented with photographs and videos.
22. He confirmed that the purchase price of Kshs 8,197,401/= was paid and that the title for 162 was transferred to the 1<sup>st</sup> Defendant. He also testified that the funds were used to build a house for the Plaintiff and to support his welfare.
23. He informed the court that he was previously involved in the sale of Plot No. 162 Konza, and the proceeds from the sale were used to pay for his university fees. He stated that he had received the proceeds from the two previous agreements. He further stated that they continued living with PW1 until December 2020, when his aunts took him away.
24. He went on to state that they were later summoned by the DCI, and recorded their statements. He further stated that they also discovered that the Land Registrar had revoked the Plaintiff's title. He explained that his father being elderly, was unable to manage the funds for development. He confirmed that his father had sued him in a separate case, claiming that he had fraudulently transferred his land.
25. On cross-examination, he testified that the Plaintiff appointed him as his representative even though he did not have a Power of Attorney. He further testified that his father owned parcel No. 162, as shown in the map, although it was listed as parcel No. 1620 in the sale agreement. He also testified that the Plaintiff authorized the transfer of funds to his account, even though this was not indicated in the sale agreement. Additionally, he acknowledged escorting the Plaintiff to the Land Control Board and confirmed using the purchase price for development.



26. DW3 Samuel Maina, a Land Registrar based in Makueni, testified that land parcel No. Konza South Block 5/1620 has three green cards, but one was revoked because it was a duplicate. He stated that the remaining two green cards confirm the land is registered in the name of John Kimona Muthee.
27. He testified that there are two green cards for land parcel No. Konza South Block 5/162. The first one was registered on 1<sup>st</sup> August 2019, in the name of John Kimona Muthee, with a title issued on January 28, 2019, while the second green card has a digit that has been erased. He took the court through the records and pointed out that entry No. 5 dated 30<sup>th</sup> August, 2019, shows a transfer to the 1<sup>st</sup> Defendant.
28. On cross-examination by Mr Kithuka, he stated that there was no transfer, consent, or stamp duty noted in the parcel file for land parcel No.1620.
29. He further testified that they did not have the green card held by the 1<sup>st</sup> Defendant but had the one with several alterations. Regarding Parcel No. 162, he testified that there was an alteration of a single digit and that no transfer documents were in the file. According to him, it is impossible to have transfer documents for parcel No. 1620 and for a title to be issued for parcel No. 162.
30. On cross-examination by Mwale, he reiterated that he did not have the transfer documents supporting entry No. 5 of the green card. He further testified that the transfer form for land Parcel No. Konza South Block 5/1620, signed by PW1 and the 1<sup>st</sup> Defendant, was registered on 25/08/2018.
31. He confirmed that the title for Konza South Block 5/162 is registered in the name of Tom Onyango Macakiage and was issued on 30/08/2018.
32. DW3 PC John Odhiambo, attached to the Makueni DCI Office, testified that the Plaintiff, along with his two daughters, reported that his grandson, Vincent Muasya, had fraudulently sold land parcel No. 1620. He testified that the Plaintiff provided him with a sale agreement dated 20/7/2018 between himself and Tom Onyango Macakiage, which he denied signing, and the document was submitted for forensic analysis.
33. He also stated that the complainant provided him with two titles: Konza South Block 5/1620, dated 10/7/2018, registered in his name, and title No. Konza South Block (Konza) 1620, dated 7/7/2017, which was also registered in his name.
34. Upon conducting investigations, he discovered that the title dated 10/7/2018 had been cancelled and recalled.
35. On cross-examination, he testified that the National Registration Bureau confirmed that the thumbprint on the sale agreement belonged to the Plaintiff. He further testified that the Land Registrar informed him that 162 was an error that had not been rectified.
36. DW4 PC Aundry Otieno, a forensic document examiner, testified that he compared the known signature of the Plaintiff with the one on the sale agreement and concluded that both were written by the same person.
37. The appeal was canvassed by way of written submissions.

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

38. The Appellant filed his submissions dated 29<sup>th</sup> February, 2024. On his behalf, Counsel condensed grounds 1, 3, 5, 6, 7, and 8 of the Appeal. Counsel submitted that the Appellant is the registered owner of the suit property. Counsel further submitted that the sale agreement dated 20<sup>th</sup> July 2018 was signed by the 1<sup>st</sup> Respondent and the Appellant's grandson, Vincent Muasya. It was further submitted that



the entire purchase price was deposited into Vincent Muasya's bank account, and that the Appellant did not receive any money from the 1<sup>st</sup> Respondent.

39. Counsel argued that Vincent Muasya was only a witness and not the Appellant's representative. Counsel maintained that no valid reason was given for not paying the consideration to the Appellant. According to Counsel, Vincent Muasya exploited the Appellant's medical blindness and manipulated him into signing the sale agreement. Counsel asserted that the sale agreement was invalid because the purchase price was paid to a third party who lacked authority to act on behalf of the Appellant.
40. Counsel further submitted that the transfer instrument purportedly signed by the Appellant was not produced as evidence, thereby rendering it impossible to verify whether the transfer had complied with the legal requirements. Counsel contended that the 1<sup>st</sup> Respondent failed to present any evidence explaining how the transfer was carried out. To buttress this point, reliance was placed on the testimony of the Land Registrar, who confirmed that the transfer instrument was not in their records. Counsel contended that the transfer process was marred by irregularities and fraud, and therefore, it should be declared invalid.
41. Submitting on grounds 2, 4, 13, 15, 17, 18, and 20, Counsel argued that the 1<sup>st</sup> Respondent did not file a counterclaim in the suit, and therefore, no orders could be issued in his favor.
42. Submitting on grounds 10, 11, and 12, Counsel argued that the Trial Magistrate allowed DW3 and DW4 to testify, yet their witness statements were not on record, which goes against the principles of natural justice.
43. Counsel further submitted that DW2 played a video during his examination-in-chief, which Counsel opposed on behalf of the Appellant for failing to meet the requirements under the [Evidence Act](#). Concluding his submission, Counsel urged the court to allow the appeal as prayed.

### **The 1<sup>st</sup> Respondent's Submissions**

44. The 1<sup>st</sup> Respondent filed his submissions dated 14<sup>th</sup> June, 2024. On his behalf, Counsel submitted that the 1<sup>st</sup> Respondent produced a duly signed transfer form dated 25<sup>th</sup> August, 2018, the consent form, the receipt for transfer registration, and the stamp duty payment receipt in support of his evidence.
45. Counsel further submitted that the evidence referenced above demonstrates that the suit property was legally transferred to the 1<sup>st</sup> Respondent. It was further submitted that the Appellant failed to present any evidence to challenge the validity of the transfer documents.
46. Counsel identified the following issues for the court's determination:-
  - i. Whether this Court has jurisdiction to determine issues that were never raised at the trial;
  - ii. Whether the title deed for the 1<sup>st</sup> Respondent was fraudulently and procedurally issued;
  - iii. Who is the bona fide owner of the suit property?
  - iv. Whether the Appellant approached this court with clean hands;
  - v. Whether the trial court erred in awarding orders to the 1<sup>st</sup> Respondent,
  - vi. Whether the Trial court exercised its discretion judiciously in allowing additional witnesses; and
  - vii. Who should bear the costs?



47. On the first issue, Counsel submitted that the issue of payments of consideration to a third party was not raised before the trial court. Counsel emphasized that parties are bound by their pleadings and any evidence contradicting those pleadings should be disregarded.
48. Counsel further submitted that Vincent Muasya Kimona testified that the Appellant appointed him to receive the money on his behalf according to the sale agreement dated 20/7/2018.
49. Regarding the second issue, Counsel submitted that the 1<sup>st</sup> Respondent produced all the necessary documents related to the transfer of the suit property.
50. Counsel further submitted that the Land Registrar confirmed that the 1<sup>st</sup> Respondent adhered to proper procedures in obtaining the title for the suit property. Counsel contended that the investigations conducted by the Directorate of Criminal Investigations cleared the 1<sup>st</sup> Respondent of the allegations of fraud, thereby confirming that he was a bona fide purchaser. According to Counsel, the Appellant did not present any evidence to prove fraud or misrepresentation as outlined under Section 26 of the [Land Registration Act](#).
51. Regarding the third issue, Counsel submitted that the orders issued in favor of the 1<sup>st</sup> Respondent were supported by substantial evidence. Counsel further submitted that the trial court properly evaluated the legal principles in reaching its decision.
52. It was further submitted that the testimony of PW4, Samuel Maina, was relevant because it related to the land records.
53. According to Counsel, the evidence presented by the DCI officer was that of an independent witness intended to assist the court in making a well-informed decision. Counsel contended that both the Appellant and the Respondent had the opportunity to cross-examine the DCI officer, thus safeguarding their respective rights.
54. On costs, Counsel urged the court to be guided by Section 27 of the [Civil Procedure Act](#).

### **Analysis and Determination**

55. Having considered the Memorandum of Appeal, the record of appeal, and the submissions by the parties, the following issues fall for determination:-
  - a. Whether the Learned Trial Magistrate analyzed the evidence on record in arriving at his decision.
  - b. Whether the Learned Trial Magistrate erred in law and fact by issuing orders that had not been sought by the Respondent?
  - c. Whether the Appellant is entitled to the orders sought?
56. The principles which guide a first Appellate court were discussed in the case of *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123, where the Court of Appeal set out the duty of the court as follows: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 it itself and draw 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's findings 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)"

57. Similarly, in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212, the Court of Appeal held that: -

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw 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 that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

58. The Appellant denied signing the sale agreement dated 20<sup>th</sup> July 2018 with the 1<sup>st</sup> Respondent, which involves the sale of land parcel No. Konza South/Konza South Block 5 Konza/1620. The agreement states a purchase price of KShs.8 million, with Kshs.2 million payable at signing and the remaining Kshs.6 million due upon completion of the sale.

59. Based on the evidence presented, it is clear that the purchase price was deposited into Vincent Muasya's account and not into the Appellant's account. There is no evidence to suggest that he authorized the 1<sup>st</sup> Respondent to deposit the purchase money into Daniel Muasya's account. Furthermore, DW2 confirmed that he did not have the authority to have the funds deposited into his account.

60. The evidence on record shows that the Appellant filed a complaint with the DCI, accusing his grandson, Vincent, of fraudulently selling his land. In this regard, the officer conducted investigations to confirm these claims.

61. I have carefully read Hon Sagero's judgment. At paragraph 27 of the judgment, he stated the following:

“Having conceded that the sale agreement with the 1<sup>st</sup> defendant was valid under the provisions of Section 3(3) of the *Law of Contract Act*, the only issue for determination is whether the Plaintiff has demonstrated the acts of fraud pleaded in paragraph 6 of the Plaintiff against the 1<sup>st</sup> defendant, which would affect the subsequent title of the suit property, land parcel number Konza South, Konza South Block 5 (Konza) 1620.

62. Section 3(3) of the Law of Contract as follows;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. The contract upon which the suit is founded—
  - i. Is in writing;
  - ii. Is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

63. This provision is echoed in Section 38 of the *Land Act*, 2012, which stipulates that no interest in land can pass unless there is a valid contract of sale. It provides as follows: -



- (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land unless—
    - a. The contract upon which the suit is founded—
      - i. is in writing;
      - ii. Is signed by all the parties thereto; and
    - b. The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
64. The sale agreement dated 20<sup>th</sup> July 2018 shows that Vincent Muasya Kimona signed as a representative of the Appellant. It also shows that the Appellant appended his left-hand thumbprint, which he denied. Vincent Muasya confirmed that the Appellant had not donated a power of attorney authorizing him to sign the agreement on his behalf. The Appellant alleged that his property was transferred to the 1<sup>st</sup> Respondent fraudulently.
  65. A reading of paragraph 6 of the Complaint reveals that the Appellant also alleged fraudulent conduct by the 2<sup>nd</sup> Defendant.
  66. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000), Tunoi JA 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
  67. Similarly, in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the Court of Appeal held that:
 

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (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 that allegation 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*...”
  68. Although the standard of proof is not beyond a reasonable doubt, it is higher than proof on a balance of probabilities. In civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides that:-
    - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.



69. The learned trial magistrate at paragraph 39 stated as follows:-

“It is trite law that allegations of fraud must be specifically pleaded and proved.”

70. The learned trial magistrate failed to analyze the evidence on record to determine whether the Appellant proved his allegations of fraud against the Defendants or if the Appellant signed the sale agreement. The judgment does not indicate that the trial magistrate found the issue of fraud to be proven.

71. There is no evidence on record to suggest that the Appellant admitted the validity of the contract. In fact, he denies signing the agreement. The trial magistrate erred in concluding that the Appellant admitted the sale agreement's validity.

72. The learned trial magistrate further states that the Land Registrar confirmed in his evidence that the land registry is replete with dubious dealings which have prevented the 1<sup>st</sup> Defendant from obtaining his lawfully acquired title deed. With all due respect to the Magistrate, I have reviewed the Land Registrar's evidence and found no such statement.

73. The Appellant contended that the transfer documents pertained to land parcel No. Konza South Block 5/1620; However, the 1<sup>st</sup> Respondent was issued a title for land parcel No. Konza South Block 5/162. The record shows that the subject of the sale agreement was land parcel No. Konza South Block 5/1620. It is evident from the judgment that the Learned Trial Magistrate did not address this discrepancy.

74. The Appellant argued that the learned trial Magistrate erred by entering judgment in favour of the 1<sup>st</sup> Respondent, despite there being no counterclaim. The 1<sup>st</sup> Respondent asserted that the Learned Trial Magistrate based his decision on the evidence on record.

75. It is not in dispute that the 1<sup>st</sup> Respondent filed a statement of defense dated 17<sup>th</sup> January 2022 in response to the Appellant's claim. In the case of *Lamba v. National Social Security Fund & another* (Civil Appeal E168 of 2021) [2023] KECA 124 (KLR), the Court of Appeal appropriately articulated the following:

“It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the course of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.”

76. In *Karin Anne Challis vs The Hon. Attorney-General and 6 Others* [2002] eKLR, the court similarly held as follows: -

“It is a cardinal principle of the court that it will only grant relief sought by a party. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs. Using the same principle, I do hold that in a case where a party requires a cancellation or rectification or an amendment of a title, such a party must specifically plead such relief before a court of law can grant it.”



77. In the trial court's judgment, the learned Magistrate issued the following orders: -

- “i) The Land Registrar Makueni shall forthwith rectify the land register and cause the 1<sup>st</sup> Defendant to be registered as the lawful proprietor of Land Parcel No. Konza South/Konza South Block 5 (Konza)/1620.

78. It is apparent from the pleadings that none of the parties have requested the rectification of the title of the suit property.

79. This court finds that the learned trial Magistrate indeed erred in issuing the order for rectification of the land register, as none of the parties had requested it in those terms.

80. Based on the evidence before me, I find that the Magistrate failed to analyze the evidence on record in reaching his decision.

81. The upshot of the foregoing is that the appeal partially succeeds in the following terms:-

- a) The judgment delivered on 2<sup>nd</sup> November 2022 and all the subsequent orders and decree be and is hereby set aside.
- b) The file to be remitted back for hearing before another magistrate other than Hon. Sagero
- c) Each party to bear its own costs.

**HON. T. MURIGI**

**JUDGE**

**JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

IN THE PRESENCE OF: -

Kithuku for the Appellant

Mwale for the Respondent

Ahmed – Court Assistant

