

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC L APPEAL NO. E009 OF 2024

WILSON NTOKOKWUAN MUMEITA (Suing as the legal representative of) MOSES KISENTO

APPELLANT

VERSUS

NTERI MERIK-OBO KIPAICA1ST

RESPONDENT

NKOILE GROUP RANCH.....2ND

RESPONDENT

LAND REGISTRAR KAJIADO.....3RD

RESPONDENT

PETER KORINKO MOSITET.....4TH

RESPONDENT

(Being an Appeal against the Judgement of Hon. R. Oganyo in Kajiado CM ELC No. 64 of 2021 delivered on 22nd February 2024)

JUDGEMENT

1. In her **Judgement dated 22nd February 2024 in Kajiado CM ELC No. 64 of 2021**, Hon. R.A Oganyo (CM) dismissed the Appellants suit on grounds that fraud against the Respondents had not been proved.
2. Aggrieved by the said decision, the Appellant filed a **Memorandum of Appeal dated 21st March 2024** seeking that the judgement be set aside and the reliefs sought at the Lower Court be granted on grounds that:

- 1. The honourable Magistrate erred in law and fact by holding that the transfer of the land No. Kajiado/Purko/248 from Nkoile Group Ranch to Moses Kisento and Nteri Oboo was lawful yet the area list showed only the deceased was entitled to it.***

- 2. The honourable Magistrate erred in law and fact by holding that the subject property would still have been transmitted to Nteri Oboo 1st Respondent upon death of Moses Kisento yet the issue had not been raised by any party.***

- 3. The honourable Magistrate erred in law and fact by holding that the issue of ownership***

had been determined by another court yet that was not correct.

4. The honourable Magistrate erred in law and fact by failing to analyse the area list and other exhibits produced in the case.

5. The honourable Magistrate erred in law and fact by failing to hold that the appellant had discharged his burden of proof to the required standard.

6. The honourable Magistrate erred in law and fact by failing to hold that the burden of proof shifted to 1st Respondent to demonstrate how he ended up being registered as owner of subject matter alongside the deceased.

7. The honourable Magistrate erred in law and fact by failing to analyse the entire evidence.

8. The honourable Magistrate erred in law and fact by holding that the 4th Respondent's title was valid yet it was acquired when case no 54 of 2018 was still pending.

9. The honourable Magistrate erred in law and fact by failing to hold that the 2nd Respondent breached the trust between them and the deceased (Moses Kisento) by transferring the deceased shares without verification.

10. The honourable Magistrate erred in law and fact by failing to hold that the agreement dated 8th February 2005 between the 1st respondent and deceased was made after the transfer of the land hence an afterthought.

11. The honourable Magistrate erred in law and fact by holding that the criminal investigation department had confirmed the 1st respondent as owner of subject matter.

3. This Appeal was canvassed by way of written submissions.

Submissions of the Appellant

4. It was submitted that as per the area list, the deceased Moses Kisento was allocated the suit land alone, and this was confirmed by the Chairman of the Group Ranch. It

was therefore not clear and there was no evidence on how the 1st Respondent became registered alongside the deceased. It was submitted that the said registration was illegal and the Learned Trial Magistrate erred in finding that the land would still have been transferred to the 1st Respondent arguing that the two were not relatives and the land was not jointly held. It was also argued that the 1st respondent became registered in 2005 while the deceased passed on in 2007, therefore the provisions of **Section 60 and 61 of the Land Registration Act** were inapplicable.

5. It was also submitted that the lower court erred in finding that the question of ownership had already been determined while the Ruling by Hon. Gacheru J. on 3rd October 2014 did not determine or give the 1st Respondent the land.
6. Therefore, it was not demonstrated how the 1st Respondent became a registered owner and the burden of proof shifted on him to prove his alleged ownership. As such, the Appeal should be allowed.

Submissions of the 1st and 2nd Respondents

7. It was submitted that the suit property was registered in favour of the 1st Respondent and the deceased as co-owners. The deceased transferred his share to the 1st Respondent through a sale agreement dated 25th April 2005 which was signed by both parties. The 1st Respondent later sold it to the 4th Respondent. Therefore, the claim that the 1st Respondent acquired the land fraudulently and that he had not proved how he got the land was distorted because no fraud was proved against him, and he had adduced evidence of how the property passed on to him. To support this ground, reference was made to **Kuria Kiarie & 2 others vs Sammy Magera [2018] eKLR** and **Kinyanjui Kamau vs George Kamau [2015] eKLR**.

8. On whether the Respondents adduced evidence to show that the suit property passed on to them legally, it was submitted that the sale of the land was undertaken with full knowledge and consent of the deceased prior to his death. It was also noted that the deceased did not have a family and no consent to sell and transfer the land was required. It was argued that the Appellant's claim that the

deceased was not in a proper state of mind was not proved in evidence.

9. They urge that the Appeal should therefore be dismissed and the Lower Courts suit upheld.

Analysis and Determination.

10. The Appellant has lodged this Appeal citing eleven (11) grounds which can be compressed as follows;

i. The honourable Magistrate erred in law and fact by failing to hold that the appellant had discharged his burden of proof to the required standard.

ii. The honourable Magistrate erred in law and fact by failing to hold that the burden of proof shifted to 1st Respondent to demonstrate how he ended up being registered as owner of subject matter alongside the deceased.

iii. The honourable Magistrate erred in law and fact by failing to analyse the entire evidence.

11. This being a first Appeal, the court ought to re-evaluate, re-assess and re-analyze the evidence, then come to its own conclusion while bearing in mind that it did not hear or observe the witnesses.

See **Abok James Odera T/a A.J Odera & Associates Vs. John Patrick Machira T/a Machira & Co. Advocates (2013) KECA 208 (KLR)** which quoted **Kenya Ports Authority Vs. Kuston (Kenya) Limited (2009) 2 EA 212** where the Court of Appeal held;

“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 that 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”

12. Similarly in **Richard Wefwafwa Songoi Vs. Ben Munyifwa Songoi (2020) KECA 942 (KLR)** it was stated thus;

“In Selle Vs. Associated Motor Boat Company Limited (1968) E.A 123 it was expressed thus;

“.....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....”

13. The Appellant filed this suit at the Lower Court on claiming that Land parcel; Kajiado/Purko/248 was duly allotted to the late Moses Kisento, who passed away on 21st December 2007, by the 2nd Respondent. However, the 1st Respondent was unlawfully and fraudulently registered as a co-owner sometime on 16th April 2004 without the Deceased’s knowledge or consent and no instruments of co-ownership were executed. It is his case that, the issuance of a certificate of Title and the alteration of records by the 3rd Respondent was also fraudulently done. The Appellant went on to claim that the 1st Respondent transferred the suit property to the 4th Respondent during the pendency of **ELC 54 of 2018** which was against the doctrine of *lis pendens*.

14. He therefore sought for rectification of the register by the 3rd Respondent by deleting the 1st Respondent’s name

and inserting the Deceased's name. He also sought an order against the 4th Respondent restraining him from interfering with the suit property, an order of damages and costs of the suit.

15. The 1st Respondent contested the claim arguing that the suit property was registered in his name and that of the Deceased and as joint owners in 2004. The deceased later transferred it to him in 2005. It is on record that he stated that he gave the deceased thirty (30) heads of cattle as consideration and that the transfer was witnessed by the Chairman of the 2nd Respondent.

16. The Learned Trial Magistrate outlined the issue for determination; as whether the deceased's property was fraudulently transferred to the 1st Respondent. She found that there was a sale agreement dated 8th February 2005 for a consideration of Kshs. 340,000 and that the green card showed that the property was at some point jointly owned between the deceased and the 1st Respondent. She also noted that the allegation that the Deceased was of unsound mind was unproven and that the Appellant conceded that the land was jointly owned by the Deceased and the 1st Respondent. She held that, upon the

demise of one owner, the land would have automatically passed to the other registered owner. The Learned Trial Magistrate therefore found that the claim of fraud had not been proven indicating that the Director of Criminal Investigation had equally exonerated the 1st Respondent of any criminal activities regarding the suit property. The suit was therefore dismissed with costs to the Respondents.

17. As already summarised hereinabove, the crux of this suit was that the land known as; Kajiado/Purko/248 was fraudulently transferred to the 1st Respondent.

18. The Court has perused the record of Appeal. Entry number 2 of the Green card shows that the suit property was registered in favour of the late Moses Kisento on 16th April 2004 and the same entry has "Gift Nteri Merik" (1st Respondent). A Title was issued on the even date and then registered in favour of Nteri Merik-Obo Kipaika on 25th April 2004 and a restriction placed on 6th September 2011 pending investigations.

19. There was also a report dated 21st November 2011 from the Director of Criminal Investigations in relation to the claim that the 1st Respondent had obtained

registration of land through fraud. The report concluded that the allegation of fraud could not be sustained.

20. It is well settled that whoever alleges must prove. The burden was on the Appellant to prove fraud against the 1st Respondent. It did not shift to the 1st Respondent.

21. PW1, Wilson Ntokokwuan, the Appellant when cross-examined stated;

“The title would never have had both names. Nteri Merik was then given the land like a gift. The deceased Moses, was not mentally sound. I have no documents to prove this. He died on 21st December 2007. It was two years after the transfer. He was not a relative so he could have been given as a gift. The Defendant had land and having the land transferred to his names as a gift. The Deceased was buried in the said land. The Defendant did not object to the burial. I have never sat with the Plaintiff when he complained his land was stolen. My uncle was at his home taking care of cows. My uncle does not have any cows.....”

It is my view that, the issue of the mental status of Moses Kisento, (Deceased) ought to have been determined in his life time.

22. The Appellant did not produce any document to demonstrate that Moses Kisento was of unsound mind under the Mental Health Act.

His evidence cannot stand as he is not an expert.

23. I find that the Learned Trial Magistrate rightly observed that;

“In the instant case, apart from mentioning in evidence that the deceased was of unsound mind hence could not have consented to the property being jointly registered, and further that they didn’t see the transfer documents, the Plaintiff did not produce any documents to prove that the deceased was actually of unsound mind. Further the Plaintiff does not explain how a person of unsound mind was actually a member of a group ranch and could own property. This court finds that the allegations of fraud on the part of the 1st

Defendant has not been proved as per the legal threshold of beyond reasonable doubt.”

24. It is the Appellant’s case that the 1st Respondent was fraudulently registered jointly with the Deceased as the owners of the suit property and later transferred to his name (1st Respondent).

25. Section 107 to 108 of the Evidence Act is clear. The burden was on the Appellant to prove fraud and not the other way round. He did not. The burden did not shift to the 1st Respondent to explain how the land was transferred to him.

26. The explanation by the 1st Respondent does not add up but the trial court believed him.

In my view the burden was never on him to demonstrate that the land was transferred to him procedurally.

The Appellant admitted the Deceased lived at the 1st Respondent’s home and was buried on the land.

27. In the case of **Teleposta Pension Scheme Registered Trustees Vs. Inter Countries Importers and Exporters Limited and 4 Others (2016) eKLR** the court held as follows;

“It is trite law that whoever alleges must prove. It was therefore incumbent upon the plaintiff to prove fraud allegations against the Defendants to the required standard. The standard of proof in fraud cases is higher than that in ordinary civil cases. As was observed in Njuwangu Holdings Limited Vs. Langata KPA & 5 Others; the standard of proving fraud in civil cases the courts have consistently held is higher than on a balance of probabilities. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases, it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party, he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the 1st defendant have been

generalized and lack specificity and are generally unproved....”

28. I find that the Learned Trial Magistrate did not err in reaching the conclusion that the Appellant had failed to prove that the 1st Respondent fraudulently caused the suit property to be jointly registered in his name and that of, Moses Kisento (Deceased) and further that he fraudulently caused it to be transferred to himself.

29. In conclusion I find that the Learned Trial Magistrate did not err in dismissing the Appellant’s case.

30. The upshot of the matter is that I find no merit in this Appeal and the same is dismissed. I take into account the circumstances of this case and I order each party to bear own costs.

Dated, Signed and Delivered virtually at Kajiado this 27th day of November 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Itaya for the Appellant.

Mr Muriithi for Mr. Nzaku for the Respondents.

Court Assistant – Peter.

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