

**IN THE COURT OF
APPEAL AT MOMBASA
(CORAM: TUIYOTT, ACHODE & MUCHELULE, JJ.A)
CIVIL APPEAL NO. E040 OF
2023 BETWEEN**

SWALEH OMAR SAID.....APPELLANT

AND

**KHALID SALIM ABDULSHEIKH1ST
RESPONDENT FIRST COMMUNITY BANK LIMITED
2ND RESPONDENT LAND REGISTRAR MOMBASA
.....3RD RESPONDENT**

*(Being an appeal from the Judgment of the High
Court at Mombasa (Munyao J) dated 7th June 2022*

in

MOMBASA ELC No. 347 of 2017)

**** JUDGMENT OF THE
COURT**

1. This suit was commenced by an Amended Plaintiff dated 22nd February 2019, filed by Swaleh Omar Said, (the Appellant herein) in **ELC Case No. 347 of 2017** at Mombasa, seeking to overturn a land transfer agreement purportedly entered into by himself and the 1st Respondent Khalid Salim Abdulsheikh. The 1st Respondent thereafter, charged the suit properties with the 2nd Respondent. In the plaintiff, the Appellant prayed that:

- i. The Defendants be stopped from collecting rent, selling by way of auction or private treaties and/or any dealings on the suit properties;*
- ii. A declaration that the transfers conducted on*

the suit properties on 15th September 2010 and 14th July 2011 be declared as fraudulent and be cancelled;

BLOCK XXVII/136

was transferred on 14th July 2011 and also charged by the 1st Respondent to the 2nd Respondent the same day. All this was done fraudulently without his involvement.

5. The Appellant stated that he is an old man and was being helped by the 1st Respondent to carry out various tasks including collecting rent and maintaining the blocks, with free access to the Appellant's house including the bedroom. The Appellant did not report the loss of his documents to the police or obtain a police abstract. He further averred that he had closed his account with the 2nd Respondent about 5-6 years before the incident, and it was not true that he had used it to receive any money in this process. He acknowledged that the photos used in the sale agreement were his, but denied that the name reflected was his.
6. Zainab Swaleh Ahmed, the wife of the Appellant testified as PW2 and stated that she was aware that they owned and developed the two properties situated at Kibokoni and Bondeni. That the 1st Respondent was well known to her as a friend and an agent who helped the Appellant to collect rent, and who had unlimited access to their home. She was not aware of any transactions regarding the suit properties as she would have objected, since they relied on both properties for sustenance. She stated that the title documents were kept in a drawer in a cupboard in the bedroom and the 1st Respondent had access to them. She did not know the bank account details of the husband, and she did not know if he had received any money. She came to know about the sale through

a neighbor who is a kinsman, unlike the husband who only learnt about it when the auctioneers arrived.

7. Mr. Justin Samuel Kaburu PW3, a retired magistrate who was a practicing advocate, Commissioner for oaths and Notary public, testified that at no time did he see the parties in this case in his office for any land transfer agreement, or even for stamping, which he only does when handling a conveyance. He testified that the stamp used in the documents was different in size from his stamp. Therefore, he did not attest to the transfer of plot No. 76, and the alleged attestation was probably a forgery, because of the variations in the stamps and signatures.
8. PW3 maintained that the whole attestation was a forgery and was not done by him. Further that the examination of the documents did not meet the standard of verifying the signature and stamp as his, having been based on only three specimens instead of eight as required by law. He however revealed that his former employee who committed suicide after his employment was terminated may have forged the said transfer documents behind his back.
9. The 1st Respondent, Mr. Khalid Salim Abdulsheikh filed an amended defense and counterclaim dated 12th April 2019 and testified as DW1, adopting his statement as the evidence in chief. His case was that he had known the plaintiff for 7-8 years prior to the land transactions involving the suit properties. He first bought plot No. MOMBASA BLOCK XXIX/76, formerly Plot No. 137 from the Appellant in 2010, at a price of Kshs 3.5 million which he paid in instalments. One

instalment was financed by the 2nd Respondent in which both the Appellant and 1st Respondent held accounts and the Appellant confirmed receipt of the amount. The Respondent demolished the existing structures and put up new ones and had tenants therein.

10. The transaction for the second plot No.MOMBASA BLOCK XXVII/136 was negotiated in the year 2011. The agreed price was Kshs 4 million and was paid in two parts with another financing from the 2nd Respondent. The Appellant requested to be allowed to remain in the plot before he moved out but later refused to vacate. The Appellant was aware of the changes in status, including the rebuilding of plot No. XXIX/76 and the valuation of the properties for purposes of charges.
11. The 1st Respondent stated that the payments were wired into the Appellant's account registered with the 2nd Respondent. He produced in evidence two sale agreements, transfers, building plans, bank statements and receipts for both transactions as exhibits and both conveyances were executed by Kenzi Munyao Advocate. He refuted claims that he stole the Appellant's documents, or forged the documents and signatures used in the transaction as stated by the examiner's report and asserted that he had been in the Appellant's house only twice during the transaction period.
12. In addition, the 1st Respondent stated that he did not default in the obligations under the charge, and the visit by the 2nd Respondent's agents was a red herring as he had already settled the second charge on plot No. XXVII/136, although it had not been discharged yet. He stated that the allegation

that he stole the title deeds was unfounded, since the Appellant voluntarily surrendered them to him, upon payment of valuable consideration and there was nothing unusual in doing a transfer and charge simultaneously on the same day.

13. In the counterclaim the 1st Respondent contended that vide a notice issued in 2013, the Appellant was asked to vacate the premises. He sought indulgence to stay on but later refused to comply with the notice. Therefore, the 1st Respondent prayed that: the suit be dismissed; the Appellant be forced to comply with the notice and pay the mesne profits for the time he refused to comply with the notice; and the 1st Respondent be declared the owner of the suit properties which are duly registered in his name.
14. Mr. Geoffrey Chania DW2, was a police superintendent working with the National Police Service as a Forensic Examiner of documents, stamps, signatures and symbols that are disputed. He testified that he received four documents forwarded by a letter from Okanga Advocate seeking review and ascertainment of the authenticity and originality of the documents and signatures used in the disputed transaction. He examined the documents, signatures and stamps and formed the opinion that they were all authentic and signed by the same person. He produced the report in evidence. He confirmed that he worked on the documents independently under the instruction of the DCI who received the request from Okanga Advocates. He had no contacts or support from either party. He did not know them, and they did not influence him.

15. The 2nd Respondent filed a statement of defence dated 12th March 2019. Mr. Mohammed Aden Mohamed, DW3 a Recoveries Manager at the 2nd Respondent, testified that he knows the 1st Respondent from interacting with him during the transactions of charging two properties. He adopted his witness statement and produced the documents in evidence. His evidence was that they advanced to the 1st Respondent two facilities. The first was to finance the purchase of plot No. 136 and a restructure for Kshs 3.6 million in 2014. The second facility was for Kshs 1.6 million also charged on the same plot and that the loan concerning plot 76 was fully paid.
16. DW3 clarified that Kshs 3 million was transferred into the account of the 1st Respondent for onward transfer to the Appellant's account. On cross examination he stated that the Appellant's name appeared as Saleh Umeir Said on his passport used for identification. That the bank transferred the money from the account of Khalid Salim into Kongowea Kengeleni Self Help group where Saleh Umeir Said was a member. The money was transferred therefrom into Saleh Umeir Said's personal account on the same day and was withdrawn over the counter on the same day. Thereafter the account remained dormant. He did not see any affidavit to confirm that both identities Saleh Omar Said and Saleh Umeir Said belonged to the Appellant.
17. The evidence of Charles Roche DW4, contained in his witness statement dated 4th September 2019, was that as far as they knew the suit properties were registered in the name of the 1st Respondent and they were not aware of any fraud

in the

transfers. They had the properties charged for loans advanced to the 1st Respondent and he gave them the Statutory Power of Sale to be exercised upon default in repayment.

18. DW4 stated that they did due diligence with relevant authorities and ascertained that the suit properties were indeed owned by the 1st Respondent. They, therefore, prayed that the suit be dismissed and they be allowed to proceed with the exercise of the Statutory Power of Sale since the 1st Respondent had defaulted on the charge extended to him and the suit properties were the securities.
19. The office of the Attorney General filed a statement of defence dated 21st January 2020 on behalf of the 3rd Respondent and denied all the averments by the Appellant concerning the registration of the titles in the name of the 1st Respondent.
20. The Appellant filed a Replying affidavit dated 18th April 2019 to counter the 1st Respondent's defence and counterclaim and urged the Court to dismiss them both.
21. Munyao J. considered the evidence and rendered his judgement on 7th June 2022, dismissing the Appellant's suit and allowing the 1st Respondent's Counterclaim.
22. Dissatisfied with the decision of the court, the Appellant filed a notice of appeal dated 8th June 2022 in this Court. In the Memorandum of Appeal dated 21st March 2023 he raised 20 grounds challenging the trial court's judgment. The grounds are lengthy, wordy and argumentative and we deemed it wise to distill the crux of his complaint in each ground for

ease of reference. In summary, he alleged that the learned Judge

erred in law and fact in making findings that were against the weight of evidence

23. The Appellant prayed that the appeal be allowed with costs, the judgment and decree dated 7th June 2022 be set aside, the 1st Respondent's Counterclaim amended on 12th April 2019 be dismissed and the Appellant's Amended Plaint dated 22nd February 2019 be allowed as prayed.
24. The Appellant filed written submissions dated 2nd October 2024 through the firm of M/s J.K. Mwarandu & Company Advocates. He averred that all the documents produced by the 1st Respondent were forged. The transfer documents had irregularities and the building plan produced was for plot No. Mombasa Block XXIX/317 whereas the suit property are Mombasa/Block XXXIX/76 and Mombasa Block XVII/136.
25. It is his submission that there was no evidence of payment of the purchase price as there was no acknowledgment by the Appellant of such payment. Further, that the 1st Respondent stated that the firm of M/s Munyao Kenzi Advocates drew the sale agreement dated 20th January 2011 and another undated one, while the learned Judge found that it was homemade.
26. He contends that the learned Judge erred by ignoring the evidence of PW3 that he did not attest to the transfer, and that the signature and the rubber stamp in the transfer document were forged. It is posited that DW2, the Document Examiner, did shoddy work by not collecting eight sample signature specimens from Justin Kaburu advocate, Mwashunga Mtana Advocate and the Appellant, as required

by law. He relied on

three documents with signatures that did not resemble each other.

27. It is also submitted that the learned Judge was wrong in holding that a building plan for plot No. Mombasa Block XXIX/317 was evidence that the 1st Respondent knocked down plot No. Mombasa Block XXIX/76 and constructed two storey building.
28. Further, that the Appellant's wife did not give spousal consent as required by **section 28** of the **Land Registration Act**. In his view, the trial court did not have power to waive these mandatory provisions of the Land Registration Act.
29. The 1st Respondent's submissions dated 23rd October 2024 were filed through the firm of Okanga & Company Advocates. His argument is that the findings of the learned Judge were proper and in accordance with the law, since there was evidence of the purchases and payment of valuable consideration. Therefore, the appeal should be dismissed for lack merit.
30. Counsel submits that there was no clarity as to what the Appellant was complaining about, concerning the findings of the learned Judge. He contends that the signature of Justin Kaburu was subjected to a Forensic Examiner by the name of Geoffrey Chania and no expert witness dislodged his expert opinion. He urges that the non-appearance of Murshid Advocate was of no consequence as the sale agreement contained the particulars of the Appellant such as the passport photo and KRA pin.

31. Counsel submits that the accounts used for payment in Kongowea Self Help Group are associated with the Appellant and the monies were eventually disbursed to him. The payments for valuable consideration were made in full as per the account statements. That the 1st Respondent charged the suit properties and the proceeds of the charge were remitted to the Appellant as shown in the Asset Finance Agreement in the record of appeal.
32. Counsel asserts that the Appellant also goes by the name of Saleh Umeir Said as shown in the passport and verifying documents in the Record of Appeal, and nowhere did the learned Judge presume that the 1st Respondent loaned the Appellant any monies.
33. Counsel contends that the building plans are enough proof that the 1st Respondent was the one who did the renovations after demolitions, and since the current Land Registration Act 2012 had not come into force, there was no need for spousal consent in the transactions.
34. Counsel also states that it is not clear which documents have two interpretations as alleged by the Appellant. The learned Judge properly made findings regarding the transfers and the 1st Respondent proved the acquisition of the suit properties by presenting the sale agreements, proof of payments, building plans and approvals from the relevant authorities to merit the successful counterclaim.

35. The 2nd Respondent filed written submissions dated 28th October 2024 through the firm of M/s Mulanya & Maondo Advocates and condensed the appeal into three issues.
36. The first issue is whether the legal charges over the suit properties were duly registered in favor of the 2nd Respondent. On this, the 2nd Respondent submits that they partly financed the purchase of the suit properties and the monies were remitted to the bank account that the Appellant registered with the 2nd Respondent. The charge was presented as security over the suit properties and it was done procedurally.
37. The second issue is whether the 1st Respondent is guilty of the alleged fraud against the Appellant by transferring the suit properties to himself. On this, counsel refers to **section 112** of the **Evidence Act** on the burden of proof and asserts that the person who alleges must prove. He cites various case law including **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where the Court of Appeal held that the mere allegation of fraud is not proof of fraud. It is posited that the Appellant is attempting to renege on the agreement and disown it by terming it as fraud which is not the case.
38. Lastly, counsel urges that the suit filed by the Appellant in the trial court was incompetent for non-compliance with the mandatory requirements of **Order 2 Rule 4(1)** and **Rule 10(1)** that calls for specific pleading of particulars. Therefore, having not specifically pleaded fraud while including it in the amended plaint, made the pleadings incurably defective. The pleadings should have been

dismissed in the trial court, and

the same fate should befall this appeal which is ripe for dismissal.

39. This being the first appeal, the mandate of this Court reposes in **Rule 31 (1) (a)** of the **Court of Appeal Rules, 2022** and provides as follows:

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re- appraise the evidence and to draw inferences of fact.”

40. The mandate of the first appellate court was addressed by this Court in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212** as follows:

“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.”

41. Upon considering the record of appeal and the rival submissions, we compressed the extensive grounds of appeal into two issues for determination as follows:

- i. Whether the Appellant proved that the 1st Respondent fraudulently transferred the two suit properties*
- ii. Whether the 1st Respondent proved that he purchased the two suit properties from the*

Appellant.

42. The crux of the Appellant's case is that the 1st Respondent fraudulently transferred his property. He denied transferring the suit properties to the 1st Respondent, and asserted that the 1st Respondent stole the transfer documents from his house and transferred the suit properties into his name. The 1st Respondent on the other hand asserts that he purchased the suit properties from the Appellant. The 2nd Respondent on its part asserts that fraud was neither pleaded nor proved.

43. The learned trial Judge was satisfied that the Appellant pleaded fraud. This is what he said:

“Before I go into this, I think I need to dispense with one of the threshold issues that the defendants have raised, that is, that the plaintiff has not pleaded any particulars of fraud and thus his suit is incompetent. It is true there are no particulars of fraud pleaded, but to me, it is sufficient that the plaintiff has pleaded that the 1st defendant stole his documents and transferred them to himself without the plaintiff having done so. That is really the basis of the plaintiff's case and it is sufficient pleading to found a cause of action against the defendants. I therefore do not consider it fatal that in the particular circumstances of this case, no precise particulars of fraud have been pleaded.

44. This Court has held time and again that a claim of fraud must be specifically pleaded and strictly proved. This was the position in **Vijay Morjaria v Nansingh Madhusingh Darbar & another** [2000] KECA 223 (KLR) where it was held that:

“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. See Davy v Garrett (1878) 7 Ch. D 473 at 489.

45. In the case before us the Appellant alleges at paragraph 7 and 8 of the amended plaint that the 1st Respondent fraudulently transferred the suit properties in his name thus:

7. The search certificate showed that the 1st defendant who has access to my house being my agent stole my original titles and fraudulently transferred the same to his name and charged the said title with the 2nd defendant without my consent,

8. The plaintiff requested for green card of the two. Upon perusal he discovered that Plot No. MOMBASA BLOCK XXIX/76 was fraudulently transferred on 15th September 2010 and charged to the 2nd defendant on the same day. For the plot No. MOMBASA/BLOCK XVII/136 it was fraudulently transferred on 14th July 2011 and charged to the 2nd defendant by the 3rd defendant on the same day.

46. It is notable that the particulars of fraud were not specifically pleaded as required. Particularizing fraud means setting out, in detail, the conduct of fraud complained of. In this case, how the transfers were either executed and or registered. The learned Judge inferred fraud from the facts contrary to the principle stated in **Vijay Morjaria** *supra*.
47. Turning to whether fraud was proved, **Section 107** of the

Evidence Act places the burden of proof on the party who asserts the affirmative. In this case, it is the Appellant. The

standard of proof in fraud is intermediate; that is, higher than the balance of probabilities, but lower than beyond reasonable doubt. This standard is well articulated by this Court in **Kibathi t/a Osoro Chege Kibathi & Co Advocates v Musti Investments Ltd [2024] KECA 270 (KLR)** as follows:

“32. In this appeal, and as correctly noted by the trial judge, the fraud that the Appellant relies upon was distinctly pleaded. The question is whether that fraud was proved to the required standard. The standard of proof of fraud in civil disputes is the intermediate one, not as high as beyond reasonable doubt but, higher than on a balance of probabilities. In R. G. Patel v. Lalji Makanji [1957] EA 314, the former Court of Appeal for Eastern Africa explained the standard thus:

‘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.’

33. Further, in Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd [2010] eKLR, this Court, in rejecting what it found to be bare allegations regarding fraud, stated thus:

‘...fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability and the bare allegations put forward by the Appellant do not therefore avail him.’

34. This Court has also rejected the notion

that a party can prove fraud to the required

standard purely from inference. In his concurring judgment in Vijay Morjaria v. Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows on this point:

‘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.’

48. The Appellant’s case is that he lost his passport together with the title deed to the suit properties. He stated that he only learnt that the documents were missing on 5th April 2017 when the agents of the 2nd Respondent came to his house with auctioneers. They informed him that the suit properties were to be auctioned, since the 1st Respondent defaulted in payment of the loan. He carried out a search on the suit property and found that the 1st Respondent had transferred the suit property into his name and subsequently charged them with the 2nd Respondent.
49. To rebut the allegation the Respondents provided the court with two sale agreements between the Appellant and the 1st Respondent for the two suit properties. They also provided transfer documents from the Appellant together with plan approvals and bank statements to prove that part of the purchase price was sent to an account owned by the Appellant. Additionally, DW2, an expert witness affirmed the authenticity of the signatures in the documents.
50. We observe that the impugned transfer of the two suit properties was effected in 2010 and 2011. This implies that

the Appellant took close to seven years to discover that his title deeds were missing. It is his evidence that he was collecting rent from one of the properties, however he has not put forth evidence to prove this. Additionally, he has also not produced evidence to show that as the owner of the suit properties he was paying government rates and rents.

51. The Appellant simply pleaded and testified that the 1st Respondent had acquired his property through fraud, and that he stole his documents from his house, since he had access to his house. In his testimony he alleged that the 1st Respondent forged his signature in the transfer documents. However, DW2 confirmed that the signature was authentic and the Appellant did not call an expert witness to rebut the testimony of DW2. In the result, we find that the Appellant did not prove fraud to the required standard.
52. Turning to whether the 1st Respondent proved that he purchased the suit properties, we note that he provided the court with two sale agreements in relation to the suit properties, transfer documents, title deeds, building plan and bank statements showing that the funds were transferred from his bank account to the Appellant's bank account.
53. A certificate of Title is considered conclusive evidence of ownership of the title unless it is challenged on the grounds of fraud or illegality. This is stipulated on **section 26 (1)** of the **Land Registration Act** as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the

proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

54. Having considered the evidential material provided by the 1st and 2nd Respondents, and having already found that fraud was not proved, we are satisfied that the 1st Respondent proved that the Appellant sold him the suit properties.
55. The Appellant asserts that his spouse did not give consent for the sale of the suit properties. Thus, the sale was illegal. In **Section 28** and **93** of the **Land Registration Act** it is mandatory for spousal consent to be obtained before the sale of matrimonial property. However, we note that the sale of the suit properties predated the **Land Registration Act**. Therefore, the Act does not apply to the transfer of properties subject of this appeal. We subscribe to the holding of this Court in **Fredrick Chege Ndogo v Bernard Njoroge Mbugua & another [2016] KECA 494 (KLR)** as follows:

“We conclude this limb of the appeal by stating that the requirement for spousal

***consent is a recent development in Kenya
attributable to the***

enactment of the Land Registration Act of 2012 and the Land Act of 2012 by parliament. It had no application whatsoever to the sale of the suit land which predated the statute.

56. In the end, having carefully re-evaluated and analyzed the evidence on record afresh, we find that this appeal is lacking in merit. We dismiss it in its entirety, with costs to the 1st and 2nd Respondents.

It is so ordered.

Dated and delivered at Mombasa this 19th day of December, 2025

F. TUIYOTT

.....
.... JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

A.O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is a true copy of the original **Signed** **DEPUTY REGISTRAR***