

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA

ELC APPEAL NO. E044 OF 2023

ALFRED KWEYU KWEYU.....
APPELLANT

VERSUS

JAMES NASIO KANGU.....1ST
RESPONDENT

LAND REGISTRAR KAKAMEGA.....2ND
RESPONDENT

COUNTY LAND COMMISSIONER.....3RD
RESPONDENT

*(Being an appeal against the judgment of Hon. E.
Wasike, (PM) delivered on 21st November 2023 in Butere
MCELC Case No. 42 of 2018)*

JUDGMENT

Introduction

1. This appeal was filed by Alfred Kweyu Kweyu challenging the judgment of Hon. E. Wasike (Principal Magistrate) delivered on 21st November 2023 in Butere ELC Case No. 42 of 2018. In the impugned judgment, the learned trial

Magistrate held that the plaintiff (appellant herein) had failed to prove fraud or breach of the land sale agreement entered into by the parties herein and dismissed the appellant's suit with costs to the 1st respondent. The appellant, being dissatisfied with the said decision, lodged this appeal seeking to have the trial court judgment set aside.

Background

2. By a plaint dated 20th March 2017, the plaintiff (the appellant herein) instituted a suit against the defendants (the respondents herein) seeking, *inter alia*, cancellation of titles in respect of land parcels Marama/Shinamwenyuli/3299 and Marama/Shinamwenyuli/3300, being subdivisions of land parcel Marama/Shinamwenyuli/1852, on grounds of fraud; a declaration that the sale agreement allegedly entered into in March 2014 are declared null and void; and costs of the suit.
3. The plaintiff pleaded that about March 2014, he was the registered proprietor of land parcel number **Marama/**

Shinamwenyuli/1852 measuring approximately 5.05 acres. That he entered into a land sale agreement with the 1st defendant for the sale of one acre out of the said parcel at an agreed consideration of Kshs. 500,000/=, of which Kshs. 375,000/= was paid, leaving a balance of Kshs. 125,000/=. That the 1st defendant withheld copies of the sale agreement and later requested for the original title deed on the pretext of completing payment of the balance, which balance was never paid and the title deed allegedly not returned.

4. He further averred that owing to the 1st defendant's breach of the agreement, he entered into another sale agreement on 20th November 2014 with one John Ninja in respect of the same portion of land, and that he refunded the deposit of Kshs. 375,000/= to the 1st defendant through the firm of ABL Musiega & Company Advocates. That without his knowledge or consent, the 1st defendant fraudulently caused land parcel Marama/Shinamwenyuli/1852 to be subdivided into parcels Marama/Shinamwenyuli/3299 and Marama/Shinamwenyuli /3300, and that parcel number Marama/Shinamwenyuli/3300 was subsequently transferred

to the 1st defendant with the collusion of the 2nd and 3rd defendants.

5. He alleged that the 1st defendant forged land application forms and unlawfully procured Land Control Board consent, while the 2nd and 3rd respondents failed in their statutory duties by facilitating or failing to prevent the issuance of the resultant titles.

6. In response to the plaint, the 1st defendant filed a statement of defence dated 15th September 2017 in which he admitted that he entered into a land sale agreement with the plaintiff, who voluntarily sold to him one acre to be excised from land parcel number Marama/ Shinamwenyuli /1852 at an agreed consideration of Kshs. 500,000/=, of which Kshs. 375,000/= was paid as deposit, leaving a balance of Kshs. 125,000/=. That the said balance was not payable to the plaintiff but was meant to cater for subdivision expenses, survey fees, and legal costs for processing title deeds, with any surplus payable to the plaintiff.

7. That the surveyor was jointly identified by both parties before the area assistant chief, and that the plaintiff

voluntarily surrendered the original title deed to facilitate subdivision. He further averred that the plaintiff executed all transfer documents authorizing subdivision of land parcel Marama/ Shinamwenyuli/1852 and transfer of one acre to him in the presence of the assistant chief and the plaintiff's sons.

8. The 1st defendant further contended that the subsequent agreement between the plaintiff and John Ninja dated 20th November 2014 was fraudulent and undertaken while a valid subsisting agreement dated 27th December 2013 existed between the parties. He denied having received any refund of the purchase price and asserted that by the time the plaintiff allegedly attempted to rescind the transaction, he had already been issued with title to land parcel Marama/Shinamwenyuli/3300, having fully complied with the terms of the agreement.

9. He averred that the plaintiff attended the Land Control Board at Ibokolo, Butere Sub-County Commissioner's office, where consent for subdivision of land parcel Marama/Shinamwenyuli/1852 and transfer of parcel Marama/ Shinamwenyuli/3300 to him was granted after

confirmation that all requisite documents had been duly executed by the plaintiff. The 1st defendant maintained that he lawfully acquired the title with the plaintiff's knowledge, consent, and authority as the registered proprietor, and denied all allegations of fraud.

10. The suit proceeded to hearing through *viva voce* evidence. The 2nd and 3rd defendants never filed any response nor participated in the lower court proceedings, despite being served with summons. The plaintiff testified as the only witness in support of his case whereas the defence called three witnesses.

Plaintiff's evidence.

11. PW1, was Alfred Kweyu, the plaintiff. He adopted his witness statement dated 20th March 2017 and produced a list of documents filed on even date. He testified that he is the registered proprietor of land parcel Marama/Shinamwenyuli/1852 and that in or about March 2014 he entered into a sale agreement with the 1st defendant for the sale of one acre out of the said parcel. That although the 1st defendant paid Kshs. 375,000/=, he

failed to remit the balance of Kshs. 125,000/= and allegedly withheld copies of the sale agreement.

12. The witness stated that due to the alleged breach, he refunded the deposit through ABL Musiega & Company Advocates and subsequently sold the same portion to one John Ninja Mukolwe. That without his knowledge or consent, the 1st defendant fraudulently caused subdivision of his land and procured registration of the portion in his name, which transfer he termed fraudulent and sought to have cancelled.

13. On cross-examination, PW1 testified that the agreement between himself and the 1st defendant was executed in the presence of the Assistant Chief and members of his family. He further stated that he refunded the money through an advocate, but was uncertain whether the same was transmitted to the 1st defendant. PW1 denied having given consent, signing any transfer forms, or authorizing that the balance be used to pay a surveyor. Upon re-examination, the Plaintiff maintained that he never attended any Land Control Board meeting. That marked the close of the plaintiff's case.

Defence evidence

14. DW1 was James Nasio Kangu, the 1st defendant. He adopted his statement dated 19th August 2019 as his evidence in chief and produced a list of documents filed thereof. He testified that on 27th December 2013 he lawfully purchased one acre from the plaintiff out of land parcel Marama/Shinamwenyuli/1852 at an agreed consideration of Kshs. 500,000/=, of which Kshs. 375,000/= was paid directly to the plaintiff in the presence of the plaintiff's wife, sons, and the area Assistant Chief, while the balance of Kshs. 125,000/= was, by mutual agreement, paid to an identified land surveyor to cater for subdivision, survey, and title processing expenses.

15. That the plaintiff voluntarily surrendered the original title deed and executed all transfer and Land Control Board documents, leading to lawful subdivision of the land into parcels Marama/Shinamwenyuli/3299 and 3300, and eventual registration of parcel Marama/Shinamwenyuli/3300 in his name in August 2016. That the plaintiff later attempted to repudiate the transaction and resell the land despite having consented to

the subdivision and transfer. Further that the plaintiff acquired a sum of Kshs. 39,000/- from the 1st defendant's father.

16. DW2 was Hannington Kangu Arumi, DW1's father. He adopted his witness statement dated 19th August 2019 and stated that he witnessed the land sale agreement dated 27th December 2013 between the plaintiff and the 1st defendant for the sale of one acre out of land parcel Marama/Shinamwenyuli/1852. That the agreement was executed in the presence of the plaintiff, his wife, and their sons, and that the plaintiff received Kshs. 375,000/= as deposit.

17. He further testified that the parties agreed that the balance of Kshs. 125,000/= would be paid to the land surveyor to facilitate subdivision and processing of title deeds for both the plaintiff's family and the 1st defendant. DW2 added that in 2014 the plaintiff approached him for additional money, and unaware that his son had already settled the consideration as agreed, he paid the plaintiff Kshs. 39,000/=, which the plaintiff acknowledged in writing.

18. DW3 was Emily Atitwa Munyanya, the Assistant Chief, Mutoma sublocation. She adopted her witness statement dated 30th September 2019 as her evidence in chief and stated that the sale agreement between PW1 and DW1 was executed in her office. That the total agreed upon purchase price was Kshs. 500,000/=, of which a deposit of Kshs. 375,000/= was paid by DW1 at the time of execution, with the balance of Kshs. 125,000/= earmarked for the processing of the title deed and surveyor's fees.

19. She informed court that while she was aware of the surveyor to be appointed, she did not inquire whether the balance had been paid as her role was primarily administrative. That marked the close of the defence case.

20. Upon consideration of the pleadings, the evidence adduced at trial, and submissions, the trial court held that the sale agreement dated 27th December 2013 was executed in accordance with the formalities required by law, the deposit of Kshs. 375,000/= had been duly paid by the 1st respondent and the balance had been applied as agreed by the parties. That the plaintiff had not discharged the burden of proving fraud, misrepresentation, or breach of contract,

and accordingly dismissed the suit with costs to the 1st respondent.

21. Having been dissatisfied with the trial court's decision, the appellant lodged this appeal vide a Memorandum of appeal dated 15th December 2023, citing the following ten grounds of appeal:

- a) THAT the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellant had proved his case to the required legal standards, on a balance of probabilities.**
- b) THAT the learned trial magistrate failed in law and fact in totally failing to consider the plaintiff's evidence contrary to the established law.**
- c) THAT the learned magistrate erred in law and fact in considering issues he ought not to have considered and thereby misled himself.**
- d) THAT the learned trial magistrate erred in both law and fact in failing to find that the respondents had fraudulently transferred the suit land from the appellant without his knowledge/or consent.**

- e) THAT the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellant had refunded the entire purchase price hence there was no privity of contract between the appellant and the 1st respondent.**
- f) THAT the learned trial magistrate erred in law and fact in not taking into account the fact that the 1st respondent though given ample time was unable to call the land registrar to shed light on how the suit land was transferred from the appellant to the 1st respondent.**
- g) THAT the trial magistrate erred in law and fact in failing to appreciate the fact that it was the 1st respondent who had breached the land sale agreement by not paying the balance thereof as agreed.**
- h) THAT the trial magistrate erred in law and in fact in failing to appreciate the fact that the 1st respondent failed to call the surveyor who was allegedly paid the balance of the purchase price thereby occasioning grave miscarriage of Justice.**
- i) THAT the learned trial magistrate erred in law and in fact in failing to consider the fact**

that after refunding the purchase price to the 1st respondent he had all the rights to deal with his land as he wished to the exclusion of anyone else.

j) THAT the learned trial magistrate erred in law and fact in relying on extraneous factors in arriving at his judgement hence occasioning grave miscarriage of Justice.

22. Consequently, the appellant sought the following orders:

i. The appeal be allowed.

ii. The Honorable court to substitute the judgment of the subordinate court by;

a. Cancellation of land title deed number MARAMA / SHINAMWENYULI / 3300 and any other newly created numbers and revert the same to the parent parcel being MARAMA / SHINAMWENYULI / 1852 in the name of the appellant.

b. A declaration that the sale agreement dated 27th December 2013 is null and void.

c. Any other relief that the court may deem fit to grant.

23. The appeal was canvassed by way of written submissions.

On record are submissions filed by the appellant dated 10th July 2025 and those filed by the 1st respondent dated 14th October 2025; both of which this court has carefully considered.

Appellant's submissions.

24. Counsel for the appellant isolated six issues for determination as follows:

- i. Whether the agreement dated 27th December 2013 between the appellant and 1st respondent created a valid and enforceable contract for the sale of one acre from MARAMA/SHINAMWENYULI/1852, and whether its terms were complied with.
- ii. Whether the subdivision of land parcel MARAMA/SHINAMWENYULI/1852 and creation of MARAMA/SHINAMWENYULI/3300 was carried lawfully and with the appellant's knowledge and consent.
- iii. Whether the 1st respondent or any person acting in collusion with the respondents procured the

issuance of the new title by fraudulent means or misrepresentation as alleged.

- iv. Whether the appellant is entitled to an order for cancellation of title MARAMA/SHINAMWENYULI/3300 and a declaration that the agreement dated 27th December 2013 is null and void.
- v. Whether the trial court erred in its analysis and appreciation of the evidence, resulting in grave miscarriage of justice.
- vi. Who should bear the costs of the suit and this appeal?

25. On the first issue raised, counsel contended that despite the agreement dated 27th December 2013 between the parties herein being valid, the 1st respondent breached the agreement by failing to pay the agreed balance of Kshs. 125,000/=, notwithstanding the payment of a deposit of Kshs. 375,000/=. The appellant argued that he refunded the deposit in accordance with the law following the respondent's default, and that no evidence was provided by the 1st respondent to demonstrate lawful application of the balance sum or fulfillment of contractual obligations. In this regard, counsel submitted that the trial court erred in law

by failing to recognize the breach and improperly shifting the burden of proof onto the appellant. Reliance was placed on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] e KLR**

26. On whether the subdivision of the parent parcel and the creation of Marama/Shinamwenyuli/3300 were carried out lawfully and with the appellant's knowledge and consent, the appellant contended that at the time of transfer, the full purchase price under the sale agreement had not been paid, and that proper consent and concurrence of both parties was required under the Land Registration Act, 2012 and the terms of the agreement.

27. The appellant contended that he executed the transfer under the misrepresentation that the outstanding balance would be settled, and that failure to do so would reverse the transaction. He submitted that the trial court erred by failing to scrutinize these irregularities and incomplete payments, which demonstrated misrepresentation or fraud. Relying on **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, the appellant argued that the 1st respondent failed to prove that the acquisition of the title was lawful

and free from misrepresentation, and therefore could not invoke the doctrine of indefeasibility which was misapplied by the trial court and overlooked Article 40(6) of the Constitution and Section 26(1) of the Land Registration Act, 2012 which expressly deny protection to titles obtained through fraud, misrepresentation, illegality, or unprocedural means.

28. In justifying whether he deserved the reliefs sought, the appellant submitted that once fraud, misrepresentation, or illegality is established or properly pleaded, the court is duty-bound under Section 80(1) of the Land Registration Act, 2012 to amend or cancel the register. The appellant argued that the parcel transfer to the 1st respondent was premature, as the full purchase price had not been paid, and proper consent was not obtained. Counsel placed reliance in the case of **Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR**, where it was held that where the root of title is impeached by fraud or misrepresentation, the court must lean in favor of rectification or cancellation to restore parties to their pre-transaction positions. He prayed that the appeal be allowed with costs.

1st respondent's submissions.

29. Counsel for the 1st respondent submitted that by virtue of Sections 107 to 109 of the Evidence Act, the appellant bore the burden of proving his case, including the allegation of fraud. The respondent contended that the appellant failed to discharge this burden, and therefore the trial court properly dismissed the suit.

30. Regarding the alleged breach of contract, the 1st respondent submitted that the trial court correctly found that the agreement provided for payment of Kshs. 375,000/= as a deposit and Kshs. 125,000/= towards legal and survey expenses for subdivision and transfer. That the court noted that the appellant did not dispute receiving the deposit, nor did he dispute the quoted clause in the agreement. The respondent contended that the allegation of non-payment of the full purchase price was unsubstantiated, as there was no evidence to show any unpaid balance.

31. Regarding the allegation of fraud, counsel referred to **Elizabeth Kamene Ndolo v George Matata Ndolo [1995] eKLR** and **Urmilla W/O Mahendra Shah v**

Barclays Bank International Ltd & Another [1978]

eKLR, which held that allegations of fraud must be strictly proved to a higher standard than ordinary civil matters, though not beyond reasonable doubt. Counsel submitted that the appellant failed to provide any evidence proving fraud or misrepresentation on the part of the 1st respondent. Counsel further submitted that the appellant did not produce evidence of forged transfer forms, did not call members of the Land Control Board regarding consent to transfer, and did not object to the production of documents by the 1st respondent.

32. It was also submitted for the 1st respondent that the trial court correctly relied on Section 26 of the Land Registration Act, 2012, which provides that a registered proprietor's title is *prima facie* evidence of ownership, subject to challenge only on grounds of proven fraud or irregularity.

33. Counsel contended that the appellant's conduct, including execution of the sale agreement and delivery of the title deed, demonstrated an intention to sell the property to the 1st respondent. The respondent submitted that the

appellant's subsequent allegations of non-payment and fraud were an afterthought and motivated by malice.

34. On the issue of refund of the purchase price, counsel submitted that the trial court properly determined that the sale had been completed, and any alleged refund did not affect the validity of the subdivision or title. Counsel submitted that the appellant's arguments regarding misinterpretation of the sale agreement were unfounded, and that the trial court correctly applied the law regarding completion of purchase and registration of title and prayed that the appeal be dismissed with costs in favor of the 1st respondent.

Analysis and determination.

35. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellant court is to re-assess, re-evaluate and re-analyze the facts and the law and make its own independent conclusions. This position was stated in the case of **Selle & Another -vs- Associated Motion Boat Co. Ltd & Others (1968) EA 123.**

36. The duty of the first appellate court was discussed in the case of ***Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR***, where the Court of Appeal stated as follows;

“An appeal to this court from a trial 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 consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

37. From the grounds cited in the Memorandum of appeal two issues that arise for the court’s consideration are;

a) Whether the appellant proved that the registration of the suit property in the name of the 1st respondent was through fraud.

b) Whether the trial court was wrong in finding that the appellant failed to prove his case on the required standard.

38. It is not disputed that the suit property is registered in the name of the 1st respondent. Article 40 (6) of the

Constitution of Kenya protects the right to own and acquire property in respect only of lawfully acquired property.

39. Section 26 of the Land Registration Act provide for indefeasibility of title as follows;

“Certificate of title to be held as conclusive evidence of proprietorship

(1) 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.”

40. Therefore, registration vests in a proprietor of land, absolute and indefeasible rights, unless there is proof that the acquisition of title was by fraud, misrepresentation, want of procedure, illegality or corruption.

41. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

42. Similarly, in the case of **Dina Management Ltd v County Government of Mombasa & 5 Others [2023] e KLR** the Supreme Court of Kenya held that for a title to be held to be valid, it ought to arise from a process that is lawful and procedural and a title obtained unlawfully or

unprocedurally is invalid, even if the registered owner obtained it in good faith.

43. In circumstances where fraud is alleged, it ought to specifically pleaded and strictly proved on a standard that slightly higher than the standard of proof required in ordinary civil cases of the balance of probability, but slightly lower than the standard of proof in criminal cases of beyond reasonable doubt. (See **Kinyanjui Kamau -vs George Kamau [2015] e KLR**)

44. In the instant matter, in the plaint, the appellant sought cancellation of the 1st respondent's title allegedly under the Registration of Titles Act Cap 281 and a declaration that the sale agreement dated March 2014 be declared null and void. It is important to note that the Registration of Titles Act was repealed at the enactment of the Land Registration Act No. 3 of 2012.

45. The appellant having alleged fraud he was obligated to prove the same on the required standard. He alleged to have entered into a land sale agreement with the respondents in March 2014 for sale of one acre of land to be

excised from parcel No. Marama/Shinamwenyuli/1852 at a consideration of Kshs. 500, 000/=. That the respondents paid Kshs. 375, 000/= leaving a balance of Kshs. 125, 000/=: which remains unpaid to date. That he had no copies of the agreement because they were withheld by the respondents.

46. He further alleged that due to breach of contract on the part of the respondents, he refunded them the sum of Kshs. 375, 000/= through the firm of ABL Musiega & Company Advocates. He accused the respondents of fraud. He particularized fraud against the 1st respondent as forging land application forms; causing inclusion of the appellant's names in the application for consent to subdivide and transfer the suit property without his knowledge, colluding with the 3rd defendant to secure consent for subdivision and transfer without the appellant's knowledge and failure by the 2nd and 3rd respondents to notice the above irregularities so as to halt issuance of titles.

47. From the evidence on record, the agreement between the parties is dated 27th December 2013. There is no agreement made in March 2014 which is capable of being declared null

and void as sought in the plaint. In addition, from the agreement produced by the 1st respondent, the parties agreed that the balance of Kshs. 125, 000/= be paid and expended towards legal process in procuring the subdivision of parcel No. 1852 into several portions in favour of his children and any excess thereof be paid to one Alfred Auma upon grant of consent for transfer from the land control board.

48. The fact that parcel No. 1852 was subdivided into several parcels being parcel Nos. 3299 to 3300 is confirmed by the green card produced by the 1st respondent. Besides, in the agreement, the vendor, his wife Beatrice Auma Kweyu and six sons signed the agreement. Therefore, the appellants allegations that the purchaser denied him a copy of the agreement after he had signed it together with 7 members of his family is a matter that lacks credibility.

49. As the agreement was done in 2013, while the appellant alleged it was done in 2014; the appellant denied being paid the balance of Kshs. 125, 000/= when both parties had expressly agreed that the said balance be applied on meeting the costs of subdividing the mother title into

several titles and the allegations that the 1st respondent withheld the sale agreement from him when the same was typed and copies thereof could be available for the appellant and his family, I agree with the trial court's findings that the appellant was economical with the truth. I find his evidence inconsistent and plainly evasive. I also find and hold that the appellant did not prove fraud against the 1st respondent.

50. The suit property was actually subdivided into several plots. The appellant whose evidence lacks credibility cannot be heard to state that his documents were forged when in the agreement before court he agreed that Kshs. 125, 000/= will be used for subdivision processes, which means documents in respect of the subdivision were available for purposes of obtaining title. His allegation that he does not know how the 1st respondent obtained title is not true as he concedes to have handed him his original mother title.

51. From the evidence on record, the sale by the appellant on 27th December 2013 was valid. The appellant having sold land to the 1st respondent at a consideration which was paid in full, could not lawfully sell the same land to one John Ninja Mukolwe, as he had no capacity to sell the same.

52. In the premises, I find and hold that the findings made by the trial court are consistent with the facts of the case and the applicable law. Therefore, there is no reason whatsoever and or justification for this court's interference with the findings of the trial court.

53. Ultimately, I find no merit in the appeal before me, which I hereby dismiss with costs to the 1st respondent

54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
VIRTUALLY THIS 25TH DAY OF FEBRUARY, 2026
THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM**

**A. NYUKURI
JUDGE**

In the presence of;

No appearance for the appellant

No appearance for the respondent

Court Assistant - Delphine