

**IN THE COURT OF
APPEAL AT
NAKURU**

(CORAM: MATIVO, GACHOKA & OKELLO,

JJ.A.) CIVIL APPEAL NO. E042 OF 2021

BETWEEN

DAVID RONO.....APPELLANT

AND

CHIRCHIR PAUL KIPSANG (*Suing as the personal representative of the estate of* **RAEL TABSABEI**).....**RESPONDENT**

(An appeal against the judgment of the Environment and Land Court of Kenya at Kericho (M.C. Oundo, J.) delivered on 18th March 2021

in

ELCA No. 6 of 2018)

JUDGMENT OF THE COURT

1. By plaint, amended on 13th September 2013, the deceased, Rael Tabsabei, sued the appellant in the Chief Magistrate's Court at Kericho **CMCC No. 375 of 2013**. She averred that in 2009, she entered into a verbal agreement with the appellant, selling 0.04Ha excised from her parcel of land, namely **L.R. No. Kericho/Silibwet/1964**, to the appellant. Thereafter, a survey was done showing the appellant the physical location of that portion of land. Following the subdivision and mutation

exercise,

the properties were registered as **L.R. No. Kericho/Silibwet/2528** and **L.R. No. Kericho/Silibwet/2713**, in the names of the deceased and the appellant respectively.

2. The deceased averred that two years later, to her utter dismay, she discovered that the appellant had fenced and erected structures on her parcel of land namely **L.R. No. Kericho/Silibwet/2528**. She also discovered that the appellant engaged another surveyor to alter the mutation forms to her detriment, as she was illiterate. She thus accused the appellant of fraud, whose particulars whereof were set out.
3. On realizing this, the deceased lodged a complaint before the Land Registrar, the District Surveyor and the Area Chief. However, the appellant refused to honor his obligations as per their verbal agreement. The deceased further accused the appellant of trespass and blocking the easement of her property.
4. By judgment of the trial court dated 26th July 2018, the deceased's suit was dismissed with costs. Aggrieved by that decision, the deceased, represented by the respondent, lodged

an appeal before the Kericho ELC in ***Appeal No. 6 of 2018***.
After hearing the appeal, *Oundo, J.* found that the appeal was
merited. The learned

judge set aside the judgment of the learned magistrate. The respondent was granted the costs of the appeal. The learned judge arrived at those findings by analyzing the evidence and the law as follows:

“51. The Appellant herein having pleaded fraud and illegality on the part of the Respondent in the manner in which he obtained the suit land, the onus was on him to prove those allegations.

52. From the Appellant's pleadings and the evidence herein adduced, it is clear and without doubt that the deceased herein had pointed out to the Respondent the position of the portion of land that she had intended to sell to him. It is also clear that the land had measured '50 by 100' which is an equivalent of 0.100 acres.

53. Further I find that the Court visited the locus in quo on the 23rd January 2015 where the evidence of PW2 was taken in situ and wherein he had demonstrated to the trial Court the measurements of the Respondent's portion and position of land measuring '50 by 100' he had taken. He had even pointed out to the trial Court that the Respondent had constructed a one storey building which fell partly on the '50 by 100' portion of land.

54. PW3, Rose Chebwogen, a neighbor who had also testified in situ, stated she had been present when the deceased had sold the land to the Respondent. That the measurements by the surveyor had been taken as '50 by 100'. She had also demonstrated that the measurements had been from a certain toilet, which she showed the Court. Her evidence was that later in the year 2013, the Respondent had gone on the suit land where he had asked the deceased to cut down trees growing on his land. This was done but he had built on a different portion from the one he had been shown. PW4's evidence was that after he had cut them down the trees as asked by the deceased, the

Respondent had constructed his building on the wrong portion of land. The trial Court had

been shown the tree stamps that had remained, on the land that had been identified for Respondent.

55. From the evidence of the eye witnesses herein, it is clear that the Respondent did not take possession of the land initially identified and sold to him but constructed on another portion of land. In fact, from the evidence adduced herein, it came out clearly that PW2 who had taken the measurements of the portion of land to be excised from the original land was not the same person who drew the mutation forms. The evidence is that the Mutation was drawn by one Ritah Mutai, a person who neither visited the site nor was known to the parties herein and which drawing then placed the Respondent on the wrong position of the portion of land. The Appellant's evidence was thus that the mutation culminating into the impugned Respondent's titles did not reflect the terms of the sale agreement between the Respondent and the deceased because the portion he subsequently took possession of was different. In the Respondent's own admission, he had testified that after PW2 delayed forwarding the mutation, he (Respondent) had gone back to their (PW2 's) office wherein someone had been instructed to finish the work. He also testified that he did not know Ritah and was not aware that there had been fresh measurements taken.

56. I find this piece of evidence wanting for reason that the evidence herein adduced by the Appellant and his witnesses was that after the Land Registrar and the Surveyor had called a meeting, the Respondent had been informed that he had taken possession of a different portion of land. Parties had then tried to solve the issue amicably but the Respondent had become very harsh wherein had told the persons present to file the matter in Court instead. In fact, one witness (PW3) had even testified that when she had questioned the Respondent as to why he was trespassing, he had threatened to burn them. He therefore could not now come to Court and feign innocence. The Respondent's assertion that he was in possession of the correct

parcel of land as against the evidence received by the Court, I find was dishonest and ought to have been dismissed in the first instance.

57. It is trite that once the boundaries are marked, both the land owner and the surveyor are required to sign three copies of the Mutation Form, which are further signed by a more senior surveyor, known as the Licensed Surveyor. The mutation forms, together with the search document, the consent form from the Land Control Board, the PPA1 and the PPA2 forms are then deposited with the district survey office, where a cartographer allocates new plot numbers to the subdivided plots. The same documents are then taken to the respective land county registries to allow the land registrar to register the titles...

...59. From the above captioned definition of fraud, as well as the stated procedure regarding the drawing of mutation to the end result of issuance of the title, I find that the impugned mutation forms, which formed the basis of the allocation of plot numbers to the subdivided plots and subsequent issuance of titles to parcel No Kericho/Silibwet/2713 were not executed lawfully but were intentionally drawn with a design to obtain some unjust advantage over the deceased. I therefore find that the learned trial Magistrate erred in law and in fact in holding that the deceased was bound by her signatures affixed on the impugned mutation forms notwithstanding the evidence of the eyewitnesses that the Respondent had hived off a different site from the one initially surveyed.

60. I also find that despite there having been sufficient evidence adduced in Court to the effect that the mutation form was not drawn by a person who had visited the suit land but by someone else who had been instructed to finish the work, after the respondent had visited the surveyor's office, which evidence, although circumstantial had been corroborated by eye witnesses, the trial Magistrate had decided to rely on the contents of a mutation form which had been prepared by the purported surveyor who never visited the suit properties, whose credentials were never proved in Court and which Mutation was the bone of contention in the matter."

5. The appellant is aggrieved by those findings. He filed his notice of appeal dated 25th March 2021. He also filed his memorandum of appeal dated 5th May 2021 that raised four grounds disputing the findings of the superior court, summarized as follows: the allegations of fraud were not proved to the required standard of proof; and the learned judge relied on circumstantial, improper and inadmissible evidence to arrive at an incorrect finding against the appellant's crucial evidence. For those reasons, the appellant prayed that his appeal be allowed by setting aside or varying the judgment of the ELC. He further sought costs.
6. The appeal was canvassed by way of written submissions that were orally highlighted on 25th February 2026. Learned Counsel Mr. Okok appeared for the appellant, while Learned Counsel Mr. Koech represented the respondent.
7. The appellant filed written submissions, a case digest, and a bundle of authorities dated 9th February 2026, in which he framed three issues for determination: whether fraud was properly proved; whether circumstantial evidence is applicable in land ownership claims; and whether the learned judge relied

on inadmissible evidence.

8. On the first issue, learned counsel submitted that no fraud was proved as the deceased executed the transfer forms and documentation on her own volition. He questioned the authenticity of those allegations as the purported fraud took place when **PW1** was out of the country. Additionally, no complaint had been lodged at the land's offices. In his view, the evidence of **PW2** could not invalidate the title when the first surveyor was not called as a witness. For those reasons, it was submitted that fraud was not proved to the required standard.
9. On the second issue set out for determination, learned counsel submitted that there was willingness on the part of the deceased to execute the transfer and mutation forms. Further, the trial magistrate, who was *locus in quo*, had the advantage of seeing the demeanor of the witnesses. It was thus submitted that the trial court arrived at correct findings and it was therefore improper for the learned judge to make a contradictory finding. In his view, counsel submitted that the learned judge erroneously relied on circumstantial evidence. Lastly, Mr. Okok faulted the learned judge for heavily relying

on the evidence of **PW2** and **PW3** when

there was documentary evidence challenging their testimonies. For those reasons, he prayed that the appeal be allowed.

10. The respondent opposed the appeal. He filed written submissions and a case digest dated 24th February 2026. Learned counsel framed two issues for determination: firstly, whether the appeal raised any points of law and secondly, whether the learned judge's findings were erroneous in finding fraud on the part of the appellant? On the first issue, learned counsel submitted that the appellant was essentially inviting this Court to reevaluate the evidence as no points of law had been raised.
11. Turning to the second issue framed, learned counsel submitted that the appellant fraudulently prepared mutation forms over a different plot from the one sold to him. In fact, it was observed that the appellant disowned the surveyor, one Rita Rotich, who prepared the mutation forms. Furthermore, she never testified as a witness. He thus questioned how mutation forms could be prepared when the surveyor never visited the ground. Furthermore, **PW2**, **PW3** and **PW4**, all corroborated that the appellant took possession of the wrong parcel of land. The

appellant's actions of obtaining title, in his view, amounted to

fraud. Learned counsel thus urged this Court to sustain the findings of the first appellate court, which properly reevaluated the evidence and arrived at a correct conclusion.

12. Continuing, Mr. Koech further urged this Court to find fault in the appellant's conduct when he threatened to burn **PW3** after being questioned why he took property different from the one that he had purchased. His actions, it was argued, deprived the respondent off rightful ownership of the suit parcel of land deceitfully. It was further submitted that in certain circumstances set out in **section 98 (1)** of the Evidence Act, oral evidence could supersede documentary evidence. He prayed that the appeal be dismissed with costs.

13. This is a second appeal. We are therefore reminded to bear in mind that our scope is limited only to determining matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. [See **Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR**].

14. It is not disputed that the appellant and the deceased Rael Tabsabei, entered into a verbal agreement for sale of a portion of the suit land, originally belonging to the deceased, namely **L.R. No. Kericho/Silibwet/1964**, measuring 0.45ha in 2008 for a sum of Kshs. 400,000.00. Thereafter, a subdivision took place, giving rise to two parcels of land: **L.R. No. Kericho/Silibwet/2713**, measuring 0.04ha and **L.R. No. Kericho/Silibwet/2528** measuring 0.375ha. The latter parcel is in the name of the deceased with the title deed issued on 7th April 2009.
15. The appellant is the registered proprietor of all that parcel of land namely **L.R. No. Kericho/Silibwet/2713**. He was issued with a title deed on 10th November 2009. It is this title that the deceased at trial sought to impeach on account of fraud. **Section 26 (1)** of the Land Registration Act provides that title issued by the Registrar to a proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner and shall not be subject to challenge. However, if the propounder, contending that the property was obtained by means of fraud, misrepresentation,

illegality, unproceduralness or corruption, then that title can be extinguished.

16. In this case, the respondent contended that the appellant obtained title to the suit land by means of fraud having defrauded the deceased. It was therefore incumbent on the respondent to discharge the burden of proving fraud to the required standard as set out in the case of **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another** [2000] KECA 223 (KLR) that held 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 fraudulent must be of course be set out, and then it be stated should that 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.”

17. It is also not disputed that the certificate of search dated 25th March 2009 revealed that **L.R. No. Kericho/Silibwet/2713** belonged to the deceased. On face value, it is also apparent that the mutation form dated 23rd February 2009, was

executed by the deceased; a fact vehemently explained by the respondent as being

done deceptively. The information captured in the mutation form revealed that **L.R. No. Kericho/Silibwet/1964** was subdivided into three plots namely 2528 measuring 0.375ha, 2529 measuring 0.035ha and 2913 measuring 0.04ha. It was on this basis that the respondent raised allegations of fraud as set out in her evidence as follows:

18. **PW1**, the respondent herein, testified that the deceased, his mother, sold 0.04ha of **L.R. No. Kericho/Silibwet/1964** to the appellant. Later, in 2009, the deceased showed him the portion of land surveyed by **PW2** Joseph Otieno Ombere of Nyadiwo & Associates; who hived that part off to him by fixing permanent beacons. This was done in the presence of the deceased's neighbours **PW3** Rose Chepwogen, Joseph Ngetich and Vincent Sigei.
19. The respondent, in his evidence, observed that the surveyor who prepared the mutation forms was not the one who surveyed the property or visited it. Additionally, the deceased signed the mutation forms under the pretext that it was based on their original agreement with the appellant. In the respondent's view, the appellant took advantage of her

illiteracy.

20. Two years after the agreement, the appellant asked the deceased to fell the trees on the portion of land sold to him so that he could develop the land. In August 2013, the appellant developed the property but on the deceased's portion. That was when it was realized that the appellant had changed the location of the plot originally assigned to him, taking 1½ size more than what was agreed.

21. Speaking to the survey, **PW2** recalled that he was approached by the appellant with instructions to survey the plot following purchase of a portion of it from the deceased. On site, he met the deceased who pointed out to him the portion sold to the appellant. He described that it started from the toilet in the building adjacent to the deceased's plot that bordered the main road while the portion sold to the appellant was away from that main road. After survey, he put temporary markers showing boundaries of the two plots. The exercise took place in the presence of **PW3**, Joseph Ngetich and Vincent Sigei.

22. **PW2** later discovered that the mutation was done, but not by him.

He explained that it ought to have been done by the person who surveyed the land. He further noted that the appellant took

the

portion of land that did not belong to him and fenced it. During a court site visit *suo motu*, **PW2** demonstrated to the court what he had testified.

23. The evidence of **PW1** and **PW2** was corroborated by **PW3** who additionally recalled that on 25th August 2013, the appellant fenced a different plot from what was given to him initially. He even went ahead to clear grass on her plot, erected posts and declared that he was going to build.
24. When she challenged his actions, **PW3**'s evidence was that the appellant threatened to burn them. **PW4** Richard Kiprono Kiprui testified that the deceased sold her portion of land to the appellant measuring 50 by 100 ft. He then assisted the deceased to carve out the appellant's portion who took vacant possession after trees were felled and stones removed.
25. From the respondent's evidence, all parties corroborated that the plot sold by the deceased to the appellant was not **L.R. No. Kericho/Silibwet/2713**. It is discernible that **PW2**, the surveyor who visited the scene, was not the one who drew the mutation form. It is arising from the mutation form that the subdivided

parcels were given titles in the names of the appellant and the deceased.

26. The respondent advanced that the appellant took advantage of the deceased's illiteracy by misrepresenting her to sign the mutation forms. That she was under the semblance that the mutation was conducted consistent with their verbal sale agreement. This is where the fraudulent claims arose as particularized in paragraph 10 of the amended plaint since the parcel of land sought to be impeached by the deceased was issued to the appellant.
27. Further, **PW2** expertly testified that the surveyor, visiting the scene and surveying the land, is the one who prepares the mutation form. A critical question that arises thus is who signed the mutation form and when was this survey, morphing into the mutation form, was conducted since **PW2** distanced himself from the said document?
28. Opposing the evidence adduced, the appellant was the sole witness to his defence. His evidence was that in 2007, he got wind of the fact that the deceased wished to sell a portion of her parcel of land which he so purchased by written sale

agreement. He explained that later, a survey was done through the firm of Radimo

& Associates and was discovered that they were unlicensed and unregistered. He thus paid for the services of another surveyor 9 months later. This was where he was given the parcel of land after mutation was carried out. He contended that thereafter, they went to the Land Control Board, fenced the plot and put up a structure in 2009.

29. **DW1**'s evidence was that the deceased gave her consent to subdivide and was present at the meeting of the LCB. Interestingly, **DW1** confirmed in cross examination that **PW2** was the surveyor assigned to them. That he took measurements and put up beacons giving him the leeway to put up a permanent fence. He claimed that **PW2** was just a clerk and not a licensed surveyor. He explained that **PW2** took long to initiate the mutation process prompting him to retain the services of another surveyor.
30. He also stated that he did not know who drew the mutation form, did not know Ritah and was not aware if the other surveyor took measurements. He however stated that the deceased did not object to the mutation as she appended her signature. The trial court further took cognizance of the fact

that he was a difficult witness.

31. It is riveting that from the evidence of the appellant, he could not tell whether a survey was done for the mutation exercise to be justified. In fact, he did not know who manufactured the mutation form. How would the court then ascertain its veracity when **PW2**, the only surveyor that visited the ground, was categorical that he did not generate that mutation form?
32. The appellant acknowledged that **PW2** surveyed the land albeit claimed that he was not licenced, a fact that was not proved on a balance of probabilities. However, **PW2**'s evidence did not corroborate that of the appellant insofar as allocation of the property is concerned.
33. In our view, the evidence of the appellant raised so many questions that his evidence could not lead to a finding in his favor. No witness claimed authorship of the mutation form. How then can the Court establish its veracity? Furthermore, his evidence lacked corroboration in comparison to that of the respondent. Certainly, so, the trial court was incorrect in its findings. That incorrectness was resolved by the High Court and we see no reason to disturb those findings.

34. The appellant urged this court to adopt the parol evidence rule that was enumerated in **Chitty on Contract 29th Edition Vol. - General Principles 12.096** in the following words:

“It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances.”

35. However, as rightly pointed out by the respondent, **section 98 (1)** of the Evidence Act was inoculated with life as the respondent demonstrate that indeed, the only conclusion that could arise from the appellant’s acquisition of title was by means of fraud. This is apparent as the mutation form was done by an unknown person, who did not take measurements on the ground and went against the spirit of the contract the

deceased had with the appellant.

36. In view of the foregoing, we will say no more other than to find that the present appeal lacks merit. It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF

APPEAL DR. J. O.

OKELLO

.....
JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed
DEPUTY REGISTRAR