



Mwangale & another v Lunani & another (Environment and Land Appeal E011 of 2020) [2024] KEELC 254 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E011 OF 2020
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

MARIA NAKHUMICHA MWANGALE 1ST APPELLANT

MIRIAM OMBUL WESONGA 2ND APPELLANT

AND

KANGALIKA SOLOMON LUNANI 1ST RESPONDENT

ALFAYO WASWA MUNALA 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Butali (Hon. E W Muleka, Senior Resident Magistrate) delivered on 23rd April 2020 in Butali MCELC No. 69 of 2018)

JUDGMENT

1. The appellants moved the Subordinate Court through plaint dated 3rd April 2018 in which they averred that the first appellant was the administrator of the estate of Annah Kulanya Mwangale alias Hanah K. Mwangale (deceased) who passed away on 5th February 1997 and who was the registered proprietor of the parcel of land known as North Kabras/Kivaywa/963 (the suit property). That the first appellant sold to the second appellant $\frac{1}{4}$ of an acre of the suit property on 2nd February 2015 and that the second respondent later erected a building on the suit property in March 2017. That the first respondent unlawfully and fraudulently obtained title to the suit property then unlawfully and fraudulently transferred it to the second respondent. The appellants therefore prayed for judgment against the respondents for cancellation of the respondents' title so that the suit property reverts to the names of the deceased, that $\frac{1}{4}$ of an acre of the suit property be excised and registered in the name of the second appellant and that the second appellant (*sic*) be evicted from the suit property. They also prayed for costs and interest.



2. The respondents filed statement of defence through which they denied the appellants' allegations and urged the court to dismiss the suit with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. E W Muleka, Senior Resident Magistrate) delivered judgment on 23rd April 2020 wherein it found no merit in the appellants' suit and therefore dismissed it with costs to the respondents.
4. Aggrieved with the judgment and decree, the appellants filed this appeal through Memorandum of Appeal dated 13th May 2020. The following grounds of appeal were listed on the face of the Memorandum of Appeal:
 1. The trial magistrate erred in law and fact in holding that the Appellants did not give evidence, yet the Appellants written statements were adopted a their evidence.
 2. The trial Magistrate erred in law and fact in entering the arena of the case on matters which were not in issue and thus became biased.
 3. The trial Magistrate erred in law and fact in failing to appreciate that the Defendants failed to adduce any documentary evidence in respect of the alleged purchase of the land, not even the title document and thus the registration of the defendants/respondents as the then and present proprietors was obtained by fraud.
 4. The trial Magistrate erred in law and fact in failing to appreciate that the Respondents had obtained registration by fraud.
 5. The judgment was against the weight of evidence on record.
5. The appeal was canvassed through written submissions.
6. The appellants argued that in holding that they did not give evidence on when they conducted succession proceedings, the trial court descended to the arena of litigation and thereby became biased. That the issue before the court was ownership of the suit property and whether the respondents acquired the suit property lawfully. That the appellants witness statements were adopted yet the trial court held that they did not give evidence.
7. The appellants went on to argue that the respondents did not produce any agreement or any title deed in the name of the second respondent and that the trial court overlooked that failure on the part of the respondents. That the respondents ought to have produced documents showing how they obtained title, and that fraud was supported by the appellants' pleadings as well as witness statement. They further argued that the respondents did not offer any evidence to challenge the particulars of fraud. In conclusion, they contended that they had proven their case and that the appeal ought to be allowed.
8. In reply, the respondents argued that there is on record a copy of the register which shows that the deceased transferred the suit property long before passing away and that the second respondent became registered proprietor long before the deceased passed on. That, consequently, the deceased no longer owned the suit property as at the time of death. They closed their submissions by contending thar the appellants failed to prove their case and that the appeal should be dismissed with costs.
9. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters



not dealt with by the parties in their pleadings and evidence. See [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.

10. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether fraud and illegality were established and whether the reliefs sought are available.
11. From the material on record, there is no dispute that the deceased passed away on 5th February 1997. The deceased was registered as the first proprietor of the suit property on 23rd May 1985. The register in respect of the suit property further shows that the first respondent became the registered proprietor on 24th June 1988 and that the second respondent became the registered proprietor on 30th June 1995. It should be noted that both changes in proprietorship took place while the deceased was alive. The parties are agreement that the second respondent remains the registered proprietor to date.
12. By virtue of his registered proprietorship, the second respondent is entitled to the rights, privileges, and benefits under Section 24 of the [Land Registration Act](#). Additionally, Section 26 of the [Act](#) obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title was acquired illegally, contrary to procedure or through a corrupt scheme.
13. The appellants opted to challenge the respondents' titles on grounds of fraud and illegality. The courts have consistently stated that fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to a standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See [Kuria Kiarie & 2 others v Sammy Magera](#) [2018] eKLR and [John Mbogua Getao v Simon Parkoyiet Mokare & 4 others](#) [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See [Kinyanjui Kamau v George Kamau Njoroge](#) [2015] eKLR.
14. The particulars of fraud that the appellants pleaded at paragraph 11 of their plaint include that the respondents purported that the suit property was transferred to them when no such transfer took place, faking transfer documents, holding themselves out to land registry officials as proprietors and conspiring with land officials to grab the suit property. Those were the allegations that the appellants took upon themselves to prove so as to establish fraud and illegality.
15. I have reviewed the appellants' oral testimonies as well as their written witness statements. I did not see any proof of the allegations. Instead, the appellants adopted the attitude that the respondents were the ones to explain how they obtained their titles. They were basically telling the respondents that

“We see that you became registered proprietors of the suit property. We believe that you obtained title fraudulently and illegally. Demonstrate to us that your titles are valid.”

Unfortunately, that is not the law. The appellants had a duty to prove fraud to a standard higher than the usual one in civil cases of proof on a balance of probabilities. They cannot just make generalised allegations and hope that fraud and illegality will be inferred. Regarding illegality, they did not demonstrate which law way violated and in what manner.
16. I find that the appellants failed to establish fraud and illegality. That being the case, there was no basis to warrant impeaching the second respondent's title. It follows therefore that the reliefs that the appellants sought were not available to them.
17. I find no merit in this appeal, and I therefore dismiss it with costs to the respondents.



DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:-

Mr Athunga for the Appellants

Mr Omukunda for the Respondents

Court Assistant: E. Juma

