



**Maore v Mutega (Environment and Land Appeal E038 of 2022)
[2024] KEELC 3688 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 3688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E038 OF 2022**

CK YANO, J

JANUARY 25, 2024

BETWEEN

PHENEAS MWIRAGUA MAORE APPELLANT

AND

ALEX MUNJURI MUTEKA RESPONDENT

JUDGMENT

1. The respondent had sued the Appellant in Tigania PMC ELC Case No 68 of 2019 seeking cancellation of the appellant's title and rectification of the register and have LR No Tigania/Thananga/17xx registered in the name of the respondent. The respondent claimed that he purchased one LR No Tigania/Thananga/2xx from one M'Alaine Mburutha Samuel(now deceased) and was given the full possession of the land which he fenced and developed by planting tea bushes and gravellier trees as well as building a house.
2. It was the respondent's case that the said land LR. No Tigania/Thanaga/2xx was subdivided into several portions and mutation forms drawn as parties waited for transfer which transfer delayed as the respondent was transferred from Nairobi to Mombasa and the vendor also became sick. That the Appellant who is a neighbor and knew all these facts, including the respondent's developments took advantage of the respondent's absence and the vendor's sickness and frail mind and unlawfully, fraudulently, stealthily went ahead and bought the respondent's land. The alleged particulars of fraud and illegality were listed.
3. The respondent stated that the appellant's title was in law and equity registered to him as a trustee of the respondent and that the said title was tainted with fraud and illegality and should be cancelled.
4. The appellant denied the respondent's claim in toto. He averred that no mutation was created.
5. Both parties testified each claiming that he bought the suit land from M'Alaine M'Mburutha(Deceased). The respondent alleged that he purchased one acre from the deceased vide



- a Sale agreement dated 28th June, 2004 and took possession. That the vendor died before obtaining consent from the land Control Board. The respondent later discovered that the appellant who is neighbor had obtained title to the land.
6. The appellant also alleged that he purchased the land from the deceased vide a Sale agreement dated 15/11/2017 who prior to his death in December 2020 had caused transfer and certificate of title issued to the appellant on 8th January, 2019. He also stated that he took possession of the land upon signing the agreement for sale.
 7. After hearing the parties, the Learned Trial Magistrate Hon P M Wechuli, Senior Resident Magistrate delivered a Judgment on 7th July 2022 and found that the respondent had successfully impeached the appellant's title vis a vis the sale agreement and granted the prayers sought in the plaint.
 8. The trial court made various findings as follows. That the sale agreement relied on by the respondent was valid. The learned magistrate noted that the appellant did not file any counter claim to discredit the said sale agreement. That he did not adduce any evidence to invalidate or vitiate that agreement. That grounds such as fraud or misrepresentation or illegality that would have vitiated the agreement were never pleaded nor proved.
 9. On the issue whether the appellant's title had been defeated, the trial court found that fraud had been pleaded and particulars of fraud set out in the plaint. The learned magistrate held that the process of how the title deed was acquired by the appellant was questionable since it differed with the initial acquisition documents which is the Sale Agreement and a surveyor report ordered by the court. That without any credible explanation, an inference of fraud and illegality in the acquisition of that title was the viable explanation.
 10. On the issue as to whether the respondent ought to have sued the estate of the deceased, the trial magistrate held that the appellant did not raise the issue either as a preliminary objection or in any other manner for the same to be ventilated upon.
 11. The appellant, being dissatisfied with the said judgment preferred an appeal and filed a Memorandum of Appeal dated 12th July, 2022 in which he raised the following grounds of appeal:-
 - i. That the learned trial magistrate erred in Law and facts in failing to appreciate and analyse the evidence and arrived at erroneous Judgment.
 - ii. That the learned trial magistrate erred in law and facts in failing to appreciate and interpret the law purposively thus arrived at erroneous decision.
 - iii. That the learned trial magistrate erred in law and a fact in failing to consider the evidence that the appellant had valid title deed.
 - iv. That the learned trial magistrate erred in Law and fact in failing to consider that the evidence of fraud was not proved on the required standard (Legal and evidential)
 - v. That the learned trial magistrate erred in law and fact in failing to consider the defence and the report filled thus arriving at an erroneous decision.
 - vi. That the learned trial magistrate erred in law and fact in considering extraneous facts and evidence thus arrived at an erroneous decision.
 12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 21st November, 2023 through the firm of Joshua Mwiti Law Advocates while the respondents filed his dated 30th November, 2023 through the firm of Maitai Rimita & Company Advocates.



APPELLANT'S SUBMISSIONS

13. In their submissions, learned counsel for the appellant gave a brief facts and evidence of the matter and submitted that the learned trial magistrate considered issues which were never pleaded and not facts in issue for determination. An example was given where the trial court stated “.....without any credible explanation, an inference of fraud and illegality in the acquisition of that title is only a viable explanation ...”. The appellant’s counsel argued that whether there was discrepancy of what was in the Sale Agreement and what the title showed as to acreage was not an issue for determination before the court, and that even if it was, it is the appellant who would claim that his land was not sufficient and the claim would be to the estate of the deceased. Learned counsel for the appellant submitted that the claim before the trial court was not over acreage but cancellation of the title deed based on fraud in the acquisition of the same. That the respondent wanted a certificate of Title and had a burden to demonstrate from who his claim was based and in this matter the deceased vendor and not the appellant. Further, that to demonstrate that he was to have the title but the appellant fraudulently and illegally acquired it defeating his rights to property.
14. Learned counsel for the appellant further submitted that the trial magistrate failed to appreciate the law and evidence in proving fraud and instead considered irrelevant issues of discrepancy on the acreage which did not go to the root on ownership of title. The appellant’s counsel relied on the case of Vijay Mor Jaria Versus Nansigh Madha Singh Dardar & Another [2000]eKLR and Moses Parantal & Peris Wanjiku Mukuku (suing as the legal representative of the estate of Sospeter Mukuru Mbeere) Versus Stephen Njoroge Macharia [2020] eKLR and cited Section 26(1) of the [Land Registration Act](#) and submitted that the respondent only alleged fraud and the trial court made an inference as opposed to proving beyond reasonable doubt that there existed fraud. It was further submitted that if there was fraud in the acquisition of the title, at least the respondent would have called the legal representative of the estate of the deceased to demonstrate how the certificate of title was not intended to be given to the appellant and that the appellant acquired the same fraudulently. It was submitted that there is no evidence that the appellant was a party to fraud and misrepresentation. That the undisputed evidence was that the appellant purchased land on 15th November, 2017 and the certificate of title was issued to him during the lifetime of the deceased. The appellant’s counsel prayed for the appeal to be allowed and the decree of the lower court be set aside with costs to the appellant.

RESPONDENT'S SUBMISSIONS

15. The respondent’s counsel also gave a brief summary of the case and the evidence and submitted that the respondent is a bona fide purchaser for value of the suit property and is neither a trespasser nor licensee as he was put in possession by the vendor who later sold part of the land to the appellant. Learned counsel for the respondent relied on the case of Michael Githinji Kimotho Versus Nicholas Muratha Mugo Civil Appeal No 53 of 1995. That the appellant is the registered proprietor of LR. No. Tigania/Thananga/17xx and 17xx as such his title is indefeasible. The respondent’s counsel also cited sections 27, 28 and 30 of the Registered [Land Act](#) (repealed) which provided occupation to be indefensibility of title and Section 28(h) of the [Land Registration Act](#) and relied on the Civil Appeal No. 6 of 2011 (Consolidated with Civil Appeal No. 26, 27 of 2011) Court of Appeal at Nyeri – Machria Mwangi Maina & 87 others Versus Davidson Mwangi Kagiri [2014] eKLR. Learned counsel for the respondent submitted that the matter herein is similar to the case cited where the vendor put the respondent in possession by virtue of a Sale Agreement dated 26/6/2004, and 13 years later, the vendor resold part of the respondent’s land to the appellant and transferred the same giving rise to a new tile LR. No. Tigania/Thananga/17xx and 17xx with ill motive to defeat the respondent’s claim over the said property.



16. The respondent's counsel submitted that the appellant did not in any way lead evidence to challenge the existence of the respondents' sale agreement, adding that the transaction between the respondent and the vendor was at an advanced stage as it was just consent (of the Land Control Board) which was holding the transfer from taking place. That the respondent had made several attempts for the vendor to obtain a consent, but there was always a reason or excuse from the vendor why the consent could not be obtained at the time. The respondent's counsel relied on the case of Macharia Mwangi Maina (supra). It was further submitted that in the instant case, there was a common intention between the respondent and the vendor in relation to the suit property and there is nothing in the Land Control Act that prevented the respondent from relying upon the doctrine of constructive trust created by the facts of the case.
17. The respondent's counsel submitted that title LR. NOS. Tigania/Thananga/2xx was subdivided into LR. No. Tigania/Thananga/17xx and 17xx and subsequently transferred and registered in the name of the appellant herein to defeat the interest of the respondent. The respondent's counsel relied on the case of Macharia Mwangi Maina (Supra) and submitted that the respondent purchased the land in 2004 and extensively developed it by planting tea bushes and is registered as a tea grower No. TN.018 0192 xxxx. That it is clear from the record that both the sketch plan and mutation was drawn at the time the respondent purchased the land and therefore the respondent was shown the land which had been allocated to him. That it was only until 2019 when the respondent realized that his one-acre portion land had been subdivided into two that is LR. Tigania/Thananga/17xx and 17xx of which 17xx was given to a third party. The respondent's counsel questioned why the appellant's title deed is for 0.65 acres yet he bought 1.30 acres. It was submitted that the respondent submitted before the trial court that the alleged agreement between the appellant and the deceased was only meant to defeat the interest of the respondent in the suit land and that title LR.No. Tigania/Thananga/17xx measuring 0.65 acres was acquired fraudulently and illegally and the same therefore ought to be revoked and/or cancelled. Learned counsel for the respondent cited Section 26 and 80(1) and (2) of the Land Registration Act and relied on the case of Elijah Makeri Nyanwara Versus Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609B of 2012 and submitted that the trial court's decision is sound well informed, correct and well anchored in law and ought not to be disturbed, but the same should be upheld. The respondent's counsel submitted that the appeal has no merit and ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

18. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial Magistrate were justified on the basis of the evidence and the law. In the case of *Selle and Another Versus Associated Motor Boat Company Limited & Others* (1968) EA 123, this principle was enunciated thus:-

“.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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. In particular, this court is not bound necessarily to follow the trial Judge's finding of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence.....”



19. It was also held in *Mwangi Versus Wambugu* (1984) KLR 453 that “an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence, or where the court has clearly failed on some material point to take account of particular circumstances or probabilities to an estimate of the evidence”
20. Accordingly, I have re-evaluated the evidence that was presented before the trial court. The respondent’s evidence was that he purchased one acre of land to be excised from LR. No. Tigania/Thananga/2xx from one M’Alaine Mburutha Samwel (now deceased) in the year 2004 and was put into possession, and developed it. That the land was subdivided and mutation forms were drawn and signed by the deceased vendor who however failed to transfer the same before his demise.
21. It was further the evidence of the respondent that on or about November 2017, the appellant herein who is his neighbor also purchased land from the deceased and encroached on the respondent’s land and the same was transferred to him. The respondent’s evidence was that the Sale and transfer of the land to the appellant was fraudulent and illegal and prayed for the appellant’s title to be cancelled.
22. The appellant also testified that he purchased the suit land from the deceased and produced an agreement of sale dated 15th November, 2017. He stated that the land was transferred and registered in his name and he produced the title deed as an exhibit.
23. In the light of the foregoing evidence the Learned Magistrate believed the respondent’s claim and ordered for the cancellation of the appellant’s title on account of fraud and illegality. The trial magistrate did state in his Judgment that “The appellant’s total acreage of land on the ground does not rhyme with what was stated in the Sale Agreement. The acreage of land as per the title deed does not also rhyme with what is in the Sale agreement”. The learned trial magistrate went ahead and stated that the explanation for the said discrepancy is not credible and that the process of how the title deed was acquired is questionable since it differs with the initial acquisition document which is the Sale Agreement. The learned magistrate concluded that:

“Without any credible explanation, an inference of fraud and illegality in the acquisition of that title is the only viable explanation”.
24. In the result, the trial court held that the respondent had successfully impeached the appellant’s title and proceeded to order for its cancellation as sought by the respondent in the plaint.
25. Accordingly, in my view the issue for determination in this appeal as I can deduce from the grounds of appeal is whether fraud was proved against the appellant. It is in the process of considering that issue that I shall examine whether the trial court properly evaluated the evidence laid before it.
26. In the case of *Joseph Kipkoech Chemor Versus Kimaiyo Chemor & Another* [2019] eKLR, the Court of Appeal stated as follows:

“Firstly, the law requires that fraud be pleaded with particularity. See Order 2 Rule 10 of the Civil Procedure Rules, 2010 (CPR) (formerly Order VI rule.8)

Secondly, the onus of proving lies with the party pleading, in this case the respondent. As was stated in the case of *Wanyororo Farmers Company Limited Versus Nakuru Kiamunyeki Company Limited* [2017] eKLR; whether there was fraud is, however, a matter of evidence.

Section 107(1) of the *Evidence Act* is indeed clear on the burden of proof. It provides thus:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists”



Thirdly, on the standard of proof, it has been held time and again that imputation of fraud against a party are serious allegations which when pleaded must be proved to a standard above a balance of probabilities but not beyond reasonable doubt. It was also stated in *Vivo Energy Kenya limited Versus Maloba Petrol Station Limited & 3 others* [2015] eKLR thus:-

“where fraud is alleged, it must be specifically pleaded and particulars thereof given....even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In *R.G Patel Versus Lalji Makanji* [1957] EA 314, at page 317, the former Court of Appeal for Eastern Africa stated that:-

“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”

27. In the above case, the Court of Appeal went on and stated that :“General allegations, however strong may be the words in which they are stated, are insufficient to surmount an averment of fraud of which any court ought to take notice”

28. The question therefore is whether the respondent discharged his burden of proof in line with the above principles. The basis of the respondent’s case was fraud which he pleaded and particularized as follows:

“

“ 8. The Defendant is a neighbor of the plaintiff and knew all the facts and the plaintiff’s developments but took advantage of the plaintiff’s absence and the vendor’s sickness and frail mind and unlawfully, fraudulently, stealthily went ahead and bought the plaintiff’s land”.

Particulars of Fraud and Illegality

- a. Knowingly changing the sub-divisions and mutation forms to steal the plaintiff’s land.
- b. Acting as a conman.
- c. Telling lies to the authorities established by law.
- d. Stealing the plaintiff’s land with all the developments.
- e. Wrongfully and illegally taking away the plaintiff’s land.
- f. Taking advantage of a dying man and his greedy son.
- g. Acting against the principles of *the constitution* and doctrines of equity”

29. The particulars alleged knowingly, changing subdivision and mutation documents, lying to authorities established by law, and stealing the land with all the developments thereon, among others. Those are allegations calling for high standard of proof. Moreover, it is clear that sub-division and preparation of mutation forms could only have been done by the then registered owner and not the purchaser. In this case, the respondent did not call any witness from the family of the deceased and or the authorities referred to, to prove the particulars of fraud alleged. Apart from the discrepancy in the acreage as shown in the title deed and the agreement for sale, there was no iota of evidence tendered to prove that the appellant committed any fraud. In this case, both the appellant and the respondent claim to have purchased the same land from M’AlaineMburuthaSamwel(now deceased). The respondent alleged that he purchased the land from the deceased in the year 2004. For reasons only known to him,



the deceased did not transfer the land to the respondent from 2004 until he died on 4th January, 2019. On the other hand, the appellant entered into a Sale Agreement with the deceased on 15th November, 2017 and the land was transferred and registered in his name and title issued during the lifetime of the deceased. There is no evidence to show that the respondent filed any suit against the deceased for transfer of the suit property or for re-selling the land to the appellants. Needless to say, the respondent did not even deem it fit to join the estate of the deceased for a claim for specific performance.

29. Quite clearly, there was no evidence tendered to prove that the appellant had committed any fraud. Indeed, the learned trial magistrate only made an inference of fraud and illegality against the appellant in the absence of any credible evidence. It is trite law that fraud must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts (See Vijay Morjaria Versus Nansigh Madhasing Darbar & Another [2000] eKLR. In my considered view, there was no evidence for the finding by the trial court that fraud had been proved. The inference made by the trial court was not supported by any law and was mere supposition or conjecture. In my view, the biggest error of law made by the trial court was to shift the burden of proving fraud from the respondent to the appellant who had no burden to disprove the allegation.
30. On the whole, upon re-evaluation of the evidence on record, I am satisfied that the trial court erred in the manner it evaluated the evidence on record and in applying it to the relevant principles of law. There was thus no factual or legal basis for making the finding that the respondent had successfully impeached the appellant's title vis-a-vis the Sale Agreement. I find that the particulars of fraud were not proved to the required standard in law.
31. On those findings, I must hold that this appeal is meritorious. I allow it with the result that the Judgment and orders of the learned Senior Magistrate's Court made on 7th July, 2022 are hereby set aside. I substitute therefor an order dismissing the suit filed by the respondent.
32. The costs of the appeal as well as the costs of the lower court shall be borne by the respondent.
33. Orders accordingly

Dated, signed and delivered at MERU this 25th day of January, 2024.

Hon. C. Yano

ELC – Judge

In the presence of :-

Court Assistant – Kiragu

No appearance for Appellant

No appearance for Respondent

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JUDGMENT

