



**Waigwa & another v Waigwa (Environment and Land Appeal
32 of 2019) [2024] KEELC 150 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 32 OF 2019**

**JO OLOLA, J
JANUARY 25, 2024**

BETWEEN

LAWRENCE MWANGI WAIGWA 1ST APPELLANT

PETER MUNYUA WAIGWA 2ND APPELLANT

AND

MARY GATHONI WAIGWA RESPONDENT

*(Appeal arising from the Judgment of the Honourable R. Kefa, SRM
delivered on 25th November 2019 in Nyeri MCL&E Case No. 106 of 2018)*

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable R. Kefa, SRM delivered on 25th November 2019 in Nyeri MCL&E Case No. 106 of 2018.
2. By her Complaint dated 24th April 2018, Mary Gathoni Waigwa (the Respondent herein) had sought for Judgment to be entered against the two Appellants herein together with the Land Registrar Nyeri for orders framed as follows:-
 - a). An order that all registration and subsequent sub-division and subsequent registration done on the parcel of land Iriaini/Kairia/1xxx without the Plaintiff's authority and consent be declared null, void, illegal and fraudulent and the said registration be cancelled as well as cancellation of Iriaini/Kairia/2xxx, Iriaini/Kairia 2xxx and Iriaini/Kairia/2xxx and an order restricting any further dealings on the said Iriaini/Kairia /1xxx, as well as the resultant parcels of land Iriaini/Kairia/2xxx, Iriaini/Kairia 2xxx and Iriaini/Kairia/2xxx;
 - b). Costs of this suit; and
 - c). Any such other or further relief as this Honourable court may deem appropriate.



3. Those prayers arose from the Respondent's contention that at all times material, she was the registered proprietor of the parcel of land known as Iriaini/Kairia/1xxx. It was the Respondent's case that sometimes in the year 2011, the two Appellants herein caused the said parcel of land to be sub-divided into the three parcels of land known as Iriaini/Kairia/2xxx, 2xxx and 2xxx without her consent or authority.
4. But in their joint Statement of Defence dated 6th June 2018, Lawrence Mwangi Waigwa and Peter Munyua Waigwa (the Appellants) denied that they had caused the subdivision of the said parcel of land fraudulently and/or illegally. The Appellants contended that the said subdivision was done in accordance with the wishes of the Respondent who had intended to give the resultant 3 portions to her three sons- Joseph Wachira Waigwa and the two Appellants.
5. The Appellants further asserted that the Respondent having given them the parcels by way of gift had no lawful claim against them and state that the suit as filed was an afterthought and without any basis.
6. Having heard the dispute and in her Judgment rendered as aforesaid on 25th November 2019, the Learned Trial Magistrate was satisfied that the Respondent had proved her case on a balance of probabilities and that fraud was committed in the sub-division of the suit property into the three portions. The court accordingly declared the sub-division and subsequent registrations null and void and cancelled the resultant titles.
7. Aggrieved by the said determination, the Appellants lodged herein a Memorandum of Appeal dated 10th December 2019 urging this court to set aside the said Judgment on the grounds that:-
 - 1). The Learned Trial Magistrate erred in fact and law by failing to find that there had been a complete gift inter vivos given by the Respondent to the Appellants almost 10 years to the filing of the case and that all the parties had been in occupation and developed their respective portions without interference or objection from the Respondent;
 - 2). he Learned Trial Magistrate erred in law and fact by failing to appreciate the fact that the Respondent's evidence actually departed from and was inconsistent with her pleadings that were not amended at any time;
 - 3). The Learned Trial Magistrate erred in fact and law by finding that the Respondents (sic) had defrauded the Respondent while all the evidence including the Respondent's showed that the Respondent readily participated in identification of portions given to each party, the partition of the same and handing over to the Appellants;
 - 4). The Learned Trial Magistrate erred in law and fact by failing to find that the Plaintiff understood the gifts she was making to the parties;
 - 5). The Learned Trial Magistrate erred in law and fact by failing to give significance to the fact that the Respondent not only attended the Land Control Board meetings conducted in her vernacular language but also signed all the documents that needed to be signed to complete the transfers;
 - 6). The Learned Trial Magistrate erred in law by failing to heed the principle that the burden of proof in cases of alleged fraud is higher than mere balance of probabilities;
 - 7). The Learned Trial Magistrate erred by ordering cancellation of sub-divisions and titles disregarding the fact that the Appellants had extensively developed their parcels of land without any impediment or complaint from the Respondent; and



- 8). The Learned Trial Magistrate erred in law in the way she weighed the evidence tabled before her and ended up giving a Judgment that was against the weight of the evidence.
8. As a first Appellate Court, this court is bound to reconsider the evidence adduced before the trial court, to re-evaluate the same and to draw its own independent conclusions on whether or not to allow the Appeal. A first Appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. {See *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA123}.
9. Accordingly, I have carefully perused the Record of Appeal as well as the impugned Judgment. I have similarly perused and considered the submissions and authorities to which I was referred by the Learned Advocates representing the parties herein.
10. The dispute herein before the court is a rather unfortunate one. It revolves around an elderly mother enjoying the tacit support of two of her children against her two other children. By her Plaint dated 24th April 2018, Mary Gathoni Waigwa (the Respondent herein) accused her two sons – Lawrence Mwangi Waigwa and Peter Munyua Waigwa (the Appellants herein) of fraudulently and illegally proceeding to sub-divide her parcel of land known as Iriaini/Kairia/1xxx into three parcels of land without her consent or authority.
11. In their joint Statement of Defence dated 6th June 2018, the two Appellants did not deny causing the sub-division of the said parcel of land. It was however their case that the sub-divisions that led to the creation of land parcel numbers Iriaini/Kairia/2xxx; 2xxx and 2xx were done in the year 2011, in accordance with the wishes of their mother who had intended to give the resultant portions to her three sons, amongst them, the Appellants herein.
12. Having heard the parties and in her Judgment delivered on 25th November 2019 aforesaid, the Learned Trial Magistrate concluded as follows on the issue of the alleged fraud:-

“In this particular case the Plaintiff sets out two counts of fraud that has been pleaded against the 1st and 2nd Defendants as thus:-

- a). Making and /or causing there to be made sub-division of the said Iriaini/Kairia/1xx into three parcels of land; Iriaini/Kairia/2xxx; Iriaini/Kairia/2xxx (sic), and Iriaini/Kairia/2xxx(sic) without the Plaintiff’s authority and consent.
- b). Making and/or causing there to be made registration and sub-division of the said Iriaini/Kairia/1xxx into three parcels of land; Iriaini/Kairia/2xxx, Iriaini/Kairia/2xxx (sic), and Iriaini/Kairia/2xxx (sic) without the Plaintiff’s authority and consent.

The Plaintiff testified that she gave instructions to the 1st and 2nd Defendants to have Iriaini/Kairia /1xxx sub-divided into four portions; one for herself and the remaining three for the three sons. She told the court that she is illiterate and relied on her sons to do the right thing. After the title deeds were processed her sons informed her that the title deed for Joseph Wachira Waigwa, one of the sons, was left at the land registry. If indeed the Plaintiff had stated that the suit property to be sub-divided into three portions amongst the sons then Joseph Wachira Waigwa would not be left without a portion. Three title deeds were issued to the Plaintiff and the 1st and 2nd Defendants leaving out one of the sons.



It is for this reason that I find fraud was committed due to the fact that I don't think the Plaintiff intended to leave out one of her sons. The 1st and 2nd Defendants sub-divided the land contrary to the wish of the Plaintiff who was illiterate and they admitted that the contents of the mutation and application for consent were in English language. The two sons took advantage of their mother who is illiterate to sub-divide the suit land amongst themselves leaving one of the sons without a share against the wish of the Plaintiff."

13. As it were, the word "fraud" has been defined in Black's Law Dictionary, 11th Edition as follows:-

"A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment."

14. Considering what would amount to proof of fraud in Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, the Court of Appeal observed thus:-

"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act 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 distinctly proved and it is not allowable to leave fraud to be inferred from the facts."

15. In her claim before the court, the Respondent had asserted at Paragraph 6 of the Plaint that the closure of the original titles and the issuance of the new numbers Iriaini/Kairia/2xxx, 2xxx and 2xxx in October 2011 were fraudulent and illegal as the said sub-division was done without her consent and that she did not at any time engage a surveyor, attend the Land Control Board or give any such authority to anyone.

16. It was however clearly not true that the Respondent was unaware of the circumstances under which the sub-divisions were done and/or that they were entirely done without her authority or consent. In her own recorded statement dated 24th April 2018 and upon which she relied as her evidence-in-chief, she states at Paragraph 2 to 7 thereof as follows:-

"That I was the registered owner of parcel Iriaini/Kairia/1xxx having received the same from my late husband.

That on or about the year 2011, I decided to have my land sub-divided amongst my children. My wish was for the land Iriaini/Kairia/1xxx be divided into four portions. One for my own use and the other three portions for my three sons that is Lawrence Mwangi Waigwa, Peter Munyua Waigwa and Joseph Wachira Waigwa, all in equal shares.

That the 1st and 2nd Defendants were facilitating for the said sub-divisions. All along they informed me that the land was being sub-divided into four portions.

After the completion of the whole process, I was issued with a new title for my portion. On enquiring about the whereabouts of Joseph Wachira Waigwa ('s) title, the Defendant (s) informed me that the same was at the Lands Office in Nyeri.

Sometimes in the same year one of my daughter(s) had a disagreement with the husband and she returned home. I showed her a place to build. A dispute then arose as the 1st Defendant claimed that the part I had instructed my daughter to build belonged to him. I enquired from the Lands Office the true position and that is when I discovered the land parcel Iriaini/Kairia /1xxx was sub-divided into three portions and not four portions as I had instructed."



17. From the foregoing, it was apparent that contrary to her pleadings, the Respondent is indeed the one who gave instructions for the sub-divisions. And while she asserted in her pleadings that she never gave any consent for the subdivisions, she admitted at the trial that she signed the application for Land Control Board consent and attended the Mathira Land Control Board in the company of the Appellants.
18. As it were, the Appellants produced the application for consent addressed to the Mathira Land Control Board and it was apparent that the consent was given for the sub-divisions on the 9th June 2010. The Respondent in fact admitted at the trial that the signatures in the application for consent as well as the Mutation Form dated 14th October 2011 were made by herself. The said form refers to three subdivisions and not four.
19. And, again, while she contended that she was illiterate and just executed the documents without knowing what they were, she did not deny the Appellants' contention that the proceedings before the Mathira Land Control Board were conducted in Kikuyu language which is the same language she is captured to have used while addressing the trial court.
20. While it may as well be true, that she desired to have the suit property sub-divided into four portions, the Appellants explained clearly at the trial that one of the sons – Joseph Wachira Waigwa had refused to co-operate with them while they were processing the titles and that his portion was left in the 2.6 acres that was registered in the name of their mother being LR. NO. Iriaini/Kairia/2xxx.
22. There was no claim by the Respondent that her two sons had taken more land than they were entitled to and I did not think they were under any obligation to process a title deed for their brother who had decided not to co-operate in the process.
23. Again having gifted her sons their portions of land as she had done, and the Appellants having taken their portions and developed the same, I did not think it was open for the Respondent upon the return of her daughter to point to any portion of the land already registered in the name of the Appellants for the daughter to build a home thereon.
24. It follows that I am persuaded that there was no fraud perpetrated by the Appellants and that the trial court fell in error in reaching a finding that there was fraud merely because one of the sons was not issued with a title deed.
25. The result is that the Appeal is allowed and I hereby set aside the Judgment of the Lower Court in its entirety. The same is substituted by an order dismissing the Respondent's suit in the trial court with no orders as to costs.
26. Given the close relationships involved herein, I make no order as to the costs of this Appeal.
27. It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25TH DAY OF JANUARY, 2024.

In the presence of:

Ms. Mitchel holding brief for Ms. Nyambura for the Appellants.

Mr. Gichuki for the Respondent.

Court Assistant: Kendi

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J. O. OLOLA
JUDGE

