



**Akama & another v Oulo (Environment and Land Appeal  
E015 of 2023) [2025] KEELC 210 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E015 OF 2023  
DO OHUNGO, J  
JANUARY 30, 2025**

**BETWEEN**

**FANICE WESONGA AKAMA ..... 1<sup>ST</sup> APPELLANT**

**ESMES AKHABERE ODONGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSHUA AKAKA OULO ..... RESPONDENT**

*(Being an appeal from the judgment of the Senior Principal Magistrate's  
Court at Mumias (Hon. Thomas Obutu, Senior Principal Magistrate)  
delivered on 16th February 2023 in Mumias MCELC No. 4 of 2018)*

**JUDGMENT**

1. The background of this appeal is that through Amended Plaintiff dated 12<sup>th</sup> March 2019, the Respondent averred that in the year 2008, he entered into a sale agreement with Eunice Mirikau Akama (Eunice) through which Eunice sold to him 2 acres of land parcel number S/W/Shikalame/764. He further averred that Esmes Akhabere Odongo (Esmes) became the registered proprietor of land parcel number S/Wanga/Shikalame/1922 through fraud. The Respondent therefore sought judgment against Eunice, Esmes and Wycliffe Ofisi Akama (Wycliffe) for cancellation of entries number 6, 7 and 8 in the register of S/Wanga/Shikalame/764 and a “declaration that the same land distributed as per the certificate of confirmation of grant dated 25<sup>th</sup> September 2008 and or in the alternative a declaration that the Plaintiff is entitled to 2 acres from the share of Eunice Mirikau Akama.” He also prayed for costs.
2. Upon hearing the matter, the Subordinate Court (Hon. Thomas Obutu, Senior Principal Magistrate) delivered judgment on 16th February 2023. The learned Magistrate entered judgment in favour of the Respondent as follows:
  - a. Title to a portion of 2 acres part of S/Wanga/Shikalame/1992.



- b. Cost (sic) of the suit to the plaintiff to be paid by the defendants jointly and severally.
3. Aggrieved by the outcome, the Appellants filed this appeal on 17<sup>th</sup> March 2023, through Memorandum of Appeal dated 16<sup>th</sup> March 2023. They prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside.
4. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:
  - a. That the Honorable Learned Magistrate erred both in law and in principle by failing to declare that the agreement mainly relied on by the Respondent in the suit was void as it failed to meet the conditions set out in section 3(3) of the [Law of Contract Act](#), cap 23 Laws of Kenya.
  - b. That the Honourable Learned Magistrate erred in law and in fact to award 2 acres of land to the Respondent based on misinformation and by relying on the void contract.
  - c. That the Honourable Learned Magistrate erred in law and fact by directing that the Respondent be allowed to excise 2 acres from the 4 acres, when indeed the said title was obtained unlawfully, instead of directing that the process of succession be conducted afresh.
  - d. That the Honourable Learned Magistrate erred in law and fact by failing to interpret the futuristic nature of the Agreement that the Respondent relied on in his case and the fact that the said agreement was not completed.
  - e. That the Honourable Learned Magistrate erred in law and in fact by failing to lay a basis and justification for his judgment and there is no iota of statutory provision and case law that he has used to support his decision.
  - f. That the Honourable Learned Magistrate erred in law and principle to award costs to the Respondent herein when this is a matter of material interest.
5. The appeal was canvassed through written submissions. Directions in that regard were given in the presence of counsels representing both sides. Whereas the Appellants filed their submissions, the Respondent did not file any.
6. The Appellants argued that the Respondent did not establish any misrepresentation, illegality, want of procedure or corrupt scheme as required under Section 26 of the [Land Registration Act](#), to warrant interfering with the Second Appellant's registered proprietorship. They further argued that the Respondent's claim is grounded on the agreement dated 17<sup>th</sup> December 2008 and that to the extent that clause 1 of the said agreement provided that "... the seller will sell ...", the clause was futuristic in nature and there was no proof that the land had been sold. That the Respondent's entrance into the property was through coercion and with protests from Eunice Mirikau Akama.
7. The Appellants also argued that the agreement was not signed by the buyer and seller and was not attested, thereby rendering it non-compliant with Section 3 (3) of the [Law of Contract Act](#). Relying on the cases of Godfrey Ngatia Njoroge v James Ndungu Mungai [2019] eKLR and National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, the Appellants contended that the agreement is invalid, and parties are bound by the terms of their contract. They therefore urged the Court to allow the appeal with costs.
8. This being a first appeal, this court has an obligation to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co.*



Ltd & Others (1968) EA 123 and Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.

9. I have considered the grounds of appeal, the pleadings, the evidence and the parties' submissions. The issues that arise for determination are whether the agreement did not comply with Section 3 (3) of the Law of Contract Act, whether fraud was established and whether the Respondent was entitled to the reliefs sought.

10. Section 3 (3) of the Law of Contract Act provides:

- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless -
- (a) the contract upon which the suit is founded -
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

11. The agreement in issue is dated 17<sup>th</sup> December 2008. A perusal of the original of the said document which was produced in evidence shows that Eunice executed it by fixing her right hand thumb print while the Respondent signed it. Both the thumb print and signature were attested by a Senior Resident Magistrate at Butere Law Courts. I find no merit in the Appellants' contention that the agreement did not comply with Section 3 (3) of the Law of Contract Act.

12. The Respondent pleaded at paragraph 4A of the Amended Plaintiff that registration of the Second Appellant as the proprietor of parcel number S/Wanga/Shikalame/1922 was fraudulent.

13. The courts have severally held that an allegation of fraud is a serious matter and that a litigant who alleges fraud is required to plead it, particularise it, and to strictly prove it to a standard higher than 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. Further, such a litigant is not allowed to simply invite the court to infer fraud from the facts. See *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR.

14. The Respondent pleaded particulars of fraud at paragraph 4A of the Amended Plaintiff which included making a false grant of letters of administration and presenting a false document for registration.

15. The register in respect of S/Wanga/Shikalame/764 shows at Part B – Proprietorship Section thereof that on 9<sup>th</sup> November 2009, a caution was registered in favour of the Respondent herein who was claiming a purchaser's interest. The caution was later removed on 11<sup>th</sup> February 2013, and on the same day, Esmes, Simon Obingo, Wycliffe Ofisi and Peter Nanyolo were registered as proprietors through transmission purportedly on the basis of a Certificate of Confirmation of Grant issued in Butere Succession Cause No. 64 of 2004. Subsequently, on 17<sup>th</sup> August 2013, the title in respect of the parcel was closed upon its partition into S/Wanga/Shikalame/1922 to 1925.



16. Among the documents produced at the trial by the Appellants was a purported certificate of confirmation of grant dated 25<sup>th</sup> September 2008 allegedly issued in Butere Succession Cause No 64 of 2004. PW2, a Clerical Officer from Butere Law Courts, testified and stated that there was no such grant issued to Esmes in the said cause and that the only grant issued was to Eunice. Esmes essentially conceded this since in his testimony he stated that he did not participate in the said Butere Succession Cause.
17. I have perused the purported certificate of confirmation of grant that was produced by the Appellants and compared it with the one that the Respondent and PW2 produced. I note that the distribution in the Appellants' version is different from that vouched for by Butere Law Courts. The register in respect of S/Wanga/Shikalame/764 and the acreages assigned confirm that the partition was done on the basis of the Appellants' false certificate of confirmation of grant. I am satisfied that the Respondent proved that the Appellants made a false certificate of confirmation of grant and presented it for registration. The Respondent established fraud.
18. I have perused the Application for Partition, Transfer by Personal Representative, Application for Consent of the Land Control Board and Application to be registered as proprietor by way of transmission, all of which were produced by the Appellants, and I note that Esmes signed several of those documents. Consequently, he was party to the fraud and his title was liable to be impeached in view of the provisos under Section 26 (1) (a) and (b) of the *Land Registration Act*.
19. In view of the foregoing, I find nothing wrong with the orders finally made by the learned magistrate. The Respondent was entitled to the said reliefs.
20. This appeal is without merit, and I therefore dismiss it. Considering that the Respondent did not file any submissions in this appeal, I make no order as to costs of the appeal.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

Mr Acheru for the Appellants

No appearance for the Respondent

Court Assistant: B Kerubo

