



**Kibe v David & another (Environment and Land Appeal E005 of 2023)  
[2024] KEELC 817 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 817 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
JM MUTUNGI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JORAM MACHARIA KIBE ..... APPELLANT**

**AND**

**JACKAN WAMABIU DAVID ..... 1<sup>ST</sup> RESPONDENT**

**RHODA WAMUTIRA MUGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrates Hon. A. Lorot (CM) in MELC Case No.9 of 2018 at Wang’uru Law Courts delivered on the 27th January, 2023)*

**JUDGMENT**

1. This Judgment is on the appeal by the Appellant who was the Defendant before the Lower Court against the Judgment of the Chief Magistrate, Hon. A. Lorot delivered on 27<sup>th</sup> January, 2023 in Wang’uru CM ELC Case No. 9 of 2018. By the Judgment the Learned Trial Magistrate allowed the Plaintiffs claim and ordered that land parcel Kabare/Nyangati/8201 registered in the Appellants name be sub divided into 2 equal portions measuring  $\frac{1}{4}$  Acre each to be registered in the Appellant’s name and the 2<sup>nd</sup> Respondent’s name (2<sup>nd</sup> Plaintiff before the Lower Court) respectively with each party bearing their own costs.
2. The brief facts giving rise to the present appeal are that the 1<sup>st</sup> Respondent apparently entered into separate agreements with both the Appellant and the 2<sup>nd</sup> Respondent where he agreed to sell to them portions of what was to constitute his final beneficiary entitlement out of land parcel Kabare/Nyangati/2052 belonging to one Jackan Wamahi Njogu (deceased) whose succession proceedings were ongoing. The 1<sup>st</sup> Respondent had expected he would get 2  $\frac{1}{2}$  Acres upon conclusion of the succession and subdivision of the land. On that anticipation the 1<sup>st</sup> Respondent entered agreements with the Appellant and the 2<sup>nd</sup> Respondent to sell them portions of one (1) acre and half (1/2)



acre respectively. However, when the succession proceedings were completed the 1<sup>st</sup> Respondent's entitlement to the land was only half (1/2) acre.

3. The 1<sup>st</sup> Respondent claimed that when it dawned on him that he only had ½ Acre to his name, he mutually met and agreed with the Appellant and the 2<sup>nd</sup> Respondent that they would equally share the ½ Acre so that each would get ¼ Acre of the land. He claimed that notwithstanding the mutual agreement they had reached, the Appellant fraudulently took advantage of his illiteracy and caused him to execute various documents that ultimately resulted in the Appellant being registered as the owner of the whole of the ½ Acre leaving the 2<sup>nd</sup> Respondent with no land.
4. It was against the foregoing background that the 1<sup>st</sup> Respondent filed the suit before the Subordinate Court initially as the sole Plaintiff but later the Plaint was amended to include the 2<sup>nd</sup> Respondent as the 2<sup>nd</sup> Plaintiff. The Plaint was amended on 15<sup>th</sup> March 2019 and further amended on 10<sup>th</sup> December 2020. By the further Amended Plaint the 1<sup>st</sup> Plaintiff under paragraph 5 pleaded the particulars of the alleged fraud by the Appellant as follows:-
  - a. Making the 1<sup>st</sup> Plaintiff to sign documents which were not known to him and taking advantage of his illiteracy.
  - b. Using undue influence towards the 1<sup>st</sup> Plaintiff to sign documents which he was not aware what they were.
  - c. Coercing the 1<sup>st</sup> Plaintiff into signing the above said documents which were to the effect of transferring the whole portion of land to himself without his knowledge.
  - d. Fraudulently making the 1<sup>st</sup> Plaintiff to sign documents unknown to him against his will.
  - e. Transferring the whole portion of land above said to himself disregarding their mutual agreement.
5. The 1<sup>st</sup> Respondent prayed for Judgment against the Appellant for:-
  - a. Cancellation of title in respect of land parcel No. Kabare/Nyangati/8201 issued to the Defendant (Appellant) and the same be subdivided into two equal portions of one quarter (1/4) Acre (0.1 Ha) and each be registered in the names of the Defendant and the 2<sup>nd</sup> Plaintiff Rodah Mutira Mugo.
  - b. Costs of the suit.
6. The Appellant in his Amended Defence dated 5<sup>th</sup> September 2019 denied the contents of the Amended Plaint and specifically denied any knowledge of any sale by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent or that he was privy to such sale. He averred that he purchased 1 Acre from the 1<sup>st</sup> Respondent though he only got ½ Acre after sub division. He denied there was any meeting between them where he agreed to share the ½ Acre portion to ¼ Acre portions with anybody. The Appellant denied the particulars of fraud alleged against him and maintained the 1<sup>st</sup> Respondent executed the transfer documents voluntarily and asserted that his claims of fraud were an afterthought and that the Respondents were acting in collusion with intent to defeat justice. He averred the Respondents lacked a cause of action and sought for the dismissal of the suit with costs.
7. The matter was heard before the Learned Magistrate where both Respondents who were the Plaintiffs testified in support of the Respondents case and the Appellant testified as the sole witness in support



of the Appellant's (Defendant's) case. The Learned Trial Magistrate after hearing and evaluating and analysing the evidence in making his findings stated as follows:-

“This is a Case, that requires Solomon's Wisdom. I heard the parties as they testified and considered their every response. I have read the detailed submissions. The fact that the 2<sup>nd</sup> Plaintiff is dealing in possession of a quarter acre speaks volumes about the arrangements the parties had. The 1<sup>st</sup> Plaintiff has been very candid. He believed that his inheritance would be 2 ½ acres of land from his grandfather. He only received ½ acre. He called those he had sold to and decided to share that amongst them.

I still do not get how the Defendant tricked them and had the entire parcel registered to his name. But he did it. He acknowledges that he was paid by the 2<sup>nd</sup> Plaintiff some money to have the transfer done. This is not even disputed.

8. With that finding the Learned Trial Magistrate held the Plaintiffs case had merit and allowed the suit. He ordered land parcel Number Kabare/Nyangati/8201 registered in the Appellant's name to be subdivided into 2 equal portions of ¼ Acre each and one portion to be registered in the name of the 2<sup>nd</sup> Respondent. He further ordered that each party bears their own costs.
9. The Appellant dissatisfied and aggrieved by the Judgment has appealed against the Judgment before this Court and by the Memorandum of Appeal dated 8<sup>th</sup> February 2023 has set out 9 grounds of Appeal as hereunder:-
  1. That the Learned Chief Magistrate erred in law and fact in allowing the Respondent's claim against the weighty evidence against the claim.
  2. That the Learned Chief Magistrate erred in law and fact in failing to uphold the principles of contract.
  3. That the Learned Chief Magistrate erred in law and fact in failing to uphold that there was no privity of contract between the 2<sup>nd</sup> Respondent and the Appellant.
  4. That the Learned Chief Magistrate erred in law and fact in alluding to Solomon's wisdom when there are clear principles in law governing contract.
  5. That the Learned Chief Magistrate erred in law and fact in cancelling the Appellant's title for L.R No. Kabare/Nyangati/8201 without any justification in law.
  6. That the Learned Chief Magistrate erred in law and fact in failing to make a finding that the only remedy for the 2<sup>nd</sup> Respondent was a refund from the 1<sup>st</sup> Respondent.
  7. That the Learned Chief Magistrate erred in law and fact in relying on the mutual agreement as opposed to the written agreement.
  8. That the Learned Chief Magistrate erred in law and fact in relying on the concept of trust and possession whereas there was no claim for trust and/or adverse possession.
  9. That the Learned Chief Magistrate erred in law and fact in making an unreasonable Judgment.
10. The Appellant thus prays that the appeal be allowed. The Judgment dated 27<sup>th</sup> January 2023 be set aside and be substituted with an order dismissing the suit before the subordinate Court with costs. The Appellant prays that he be awarded the costs of the Appeal.



11. The instant appeal being a first appeal, the Court is required and indeed obligated to re-evaluate the evidence presented before the trial Court in order to arrive at its own independent conclusions of the law and fact so as to satisfy itself whether the decision reached by the trial Court was justified or not. In doing so, the Court must bear in mind that it neither saw nor heard the witnesses, which the trial Court had the benefit of doing. This principle was succinctly laid down in the Case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court of Appeal stated:-

“An appeal to this court from a trial by the High 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 ----- In particular this Court is not bound necessarily to follow the trial Judge’s finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression of a witness is inconsistent with the evidence in the case generally.”
12. Before the Lower Court the 2<sup>nd</sup> Respondent testified as PW1 and it was her evidence that she entered into a sale agreement with the 1<sup>st</sup> Respondent to purchase a portion of ¼ acre out of land parcel No. Kabare/Nyangati/8201. She produced a copy of the sale agreement dated 11<sup>th</sup> January 2017 as “DEX 1” and a copy of search certificate dated 11<sup>th</sup> January 2017 AS “DEX 2”. She adopted her witness statement recorded on 15/3/2019 as her evidence. She affirmed that at the time of entering into the agreement of sale succession proceedings relating to the estate of Jackan Wambugu Njogu was ongoing and that the 1<sup>st</sup> Respondent was occupying a portion of 2 ½ acres of the land the subject of the succession out of which he had sold a portion of 0.4 Ha to the Appellant.
13. The 2<sup>nd</sup> Respondent affirmed that when the succession proceedings were concluded, the 1<sup>st</sup> Respondent only got a portion of 0.2 Ha which necessitated her, the Appellant and the 1<sup>st</sup> Respondent to have a meeting amongst themselves, where it was mutually agreed that she and the Appellant share the 0.2 Ha equally between themselves. The 2<sup>nd</sup> Respondent stated that somehow, the Appellant got the whole portion of 0.2 Ha registered in his name and did not honour the mutual agreement to have the portion shared between themselves. The 2<sup>nd</sup> Respondent stated having taken occupation of her portion, she caused a restriction to be registered against the land and sought to have the Appellant cede 0.1 Ha of the land to her.
14. The 1<sup>st</sup> Respondent testified as PW2 and in his evidence he relied on his recorded witness statement. As per his witness statement he stated before the subdivision of land parcel No. Kabare/Nyangati/2052 he was occupying a portion of 2 ½ Acres of the same but that after subdivision he only got ½ Acre which was registered as land parcel No. Kabare/Nyangati/8201 under his names. He affirmed before the subdivision of Original land he had sold 1 acre of his entitlement to the Appellant and ½ Acre to the 2<sup>nd</sup> Respondent. He further testified that as he got a smaller portion of land than he expected, they mutually agreed that the Appellant and the 2<sup>nd</sup> Respondent would equally share the ½ Acre that he got so that each was to get ¼ Acre. The 1<sup>st</sup> Respondent stated that the Appellant took advantage of his illiteracy and caused him to sign documents that he did not understand ultimately leading to the transfer of the whole land (1/2 Acre) to the Appellant and failed to honour the mutual agreement to transfer ¼ acre portion to the 2<sup>nd</sup> Respondent.
15. In cross examination the 1<sup>st</sup> Respondent stated before the succession case the original land was family land and he was occupying and utilizing 2 ½ acres. He affirmed he entered the sale agreement with the Appellant in 2013 and with the 2<sup>nd</sup> Respondent in 2017.



16. The Appellant testified and he relied on his witness statement and the sale agreement dated 8/2/2013 and the copy of title for land parcel No. Kabare/Nyangati/8201 which shows he was registered as proprietor on 24/2/2017. In his witness statement the Appellant stated he had entered into an agreement to purchase a portion of 0.4 Ha but the 1<sup>st</sup> Respondent transferred to him only 0.2 Ha that he got after the subdivision of the original land. The Appellant claimed he was a stranger to any agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and reiterated he had an exclusive and absolute title to the suit property. He denied committing any acts of fraud maintaining that the 1<sup>st</sup> Respondent's claims of fraud were illusionary, far fetched and an afterthought.
17. The parties canvassed the appeal by way of written submissions. The Appellants submissions dated 15<sup>th</sup> September 2023 were filed on 18<sup>th</sup> September 2023 while those of the Respondents dated 7<sup>th</sup> September 2023 were filed on 8<sup>th</sup> September 2023.
18. The Appellant submitted that while the 1<sup>st</sup> Respondent had entered into separate agreements with him (the Appellant) and the 2<sup>nd</sup> Respondent, there was no privity of contract between the Appellant and the 2<sup>nd</sup> Respondent. The Appellant denied that there was any mutual agreement between him and the 2<sup>nd</sup> Respondent to share his ½ Acre land with the 2<sup>nd</sup> Respondent. Besides the Appellant submitted such an agreement would have required to be in writing pursuant to the provisions of Section 3(3) of the Law of Contract Act, Cap 23 of the Laws of Kenya to be enforceable Section 3(3) of the Law of Contract Act provides as follows:-
- 3(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 filed.
    - i. Is in writing
    - ii. Is signed by all 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.”
19. The Appellant argued that the Learned Trial Magistrate erred in relying on a none existent agreement to hold that the Appellant should share with the 2<sup>nd</sup> Respondent the ½ Acre parcel of land that was registered in his name (Appellant). The appellant submitted that the Learned Trial Magistrate had effectively re written the contract between the parties yet he had no role to do so. In support of this submission the Appellant relied on the Case of Rufale –vs- Umon Manufacturing Co (Ramsbottom) (1913) LR IKB592 and the Case of General Properties Ltd –vs- Saika Two Estate Developers Ltd (2021) eKLR.
20. The Appellant further submitted that the Respondents had not proved fraud to the required standard to warrant an order for rectification of title under Section 80 of the Land Registration Act, 2012. The said Section provides the instances under which the title of a proprietor may be cancelled and/or amended Section 80 provides as follows:-
80. Rectification by order of Court
- (1) subject to subsection 2, the Court may order the rectification of the register by direction that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.



- (2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission; fraud or mistake or substantially contributed to it by any act, neglect or default.
21. The Appellant submitted that the Learned Trial Magistrate erred to infer fraud on the part of the Appellant when there was no proof of either fraud or any procedural irregularities in the acquisition of the title by the Appellant.
22. The Respondents in their submissions supported the decision of the Learned Trial Magistrate. The Respondents maintained in their submissions that the Appellant took advantage of the 1<sup>st</sup> Respondent by having him sign documents which he did not understand which turned out to be transfer documents for the entire parcel of land. The Respondents further submitted the Learned Trial Magistrate properly and correctly implied the doctrine of constructive trust in holding the Appellant held ¼ Acre for the 2<sup>nd</sup> Respondent. The Respondents placed reliance on the Cases of Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR and Macharia Mwangi Maina & 87 Others –vs- Danson Mwangi Kagiri(2014) eKLR. It was the Respondents position that notwithstanding that the mutual agreement that the Appellant was to share the suit land equally with the 2<sup>nd</sup> Respondent was not in writing, the Court under the proviso to Section 3(3) of the Law of Contract Act could find a trust had been created in favour of the 2<sup>nd</sup> Respondent. The proviso to Section 3(3) of the Law of Contract Act provides as follows:-
- “---- provided that this section 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.”
23. Having reviewed the evidence of the parties before the Subordinate Court and having considered the Memorandum of Appeal and the Record of Appeal and the submissions made on behalf of the parties, the issues upon which this Appeal turns are as follows: -
- i. Whether the Respondents proved fraud against the Appellant to the required standard?
  - ii. Whether the Appellant held a portion of ¼ Acre out of land parcel Kabare/Nyangati/8201 under a constructive trust in favour of the 2<sup>nd</sup> Respondent?
24. The general rule in regard to the burden of proof is that he who alleges bears the burden proof. The Evidence Act, Cap 80 Laws of Kenya under Sections 107, 108 and 109 makes clear provisions as regards the burden of proof as follows:-
107. Burden of proof.
- (1) 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 exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  - (1) 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 exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

25. The Respondents pleaded fraud against the Appellant in the suit before the subordinate Court as itemized under paragraph 5 of the Further Amended Plaintiff. The burden to prove fraud rested on the Respondents. It was not sufficient for the Respondents to merely allege fraud and leave it at that. They were required to lead evidence to prove the allegations. The 1<sup>st</sup> Respondent merely stated the Appellant made him to sign documents that he did not understand only to discover later that the Appellant used the documents he had signed to effect transfer of the whole parcel of ½ Acre comprised in land parcel No. Kabare/Nyangati/8201. Which are these documents he was made to sign? Any transfer involving agricultural land requires that the consent of the Land Control Board be sought and be obtained for the transaction. The consent issued by the Land Control Board is a pre requisite document before the registration of the transfer can be processed by the Lands Office. The transfer instrument under the Land Registration Act 2012 requires to be executed by both the Transferor and the Transferee and their signatures attested and the parties to affix their passport photographs to the transfer.
26. The Land Registrar is under the Law required to hold in his custody all the documents that support any documents submitted for registration. These documents become public documents and extracts of the same would be available from the Land Registrar upon request/demand. The 1<sup>st</sup> Respondent could easily have obtained the documents that it was alleged were utilized to effect transfer to the Appellant from the Lands Office and the Court would have been in a position to scrutinize them. As per the evidence the 1<sup>st</sup> Respondent does not dispute that he had entered into an agreement to sell to the Appellant a portion of 1 Acre but that he ultimately got ½ Acre out of his expectation of 2 ½ Acres from the original parcel of land. Though the 1<sup>st</sup> Respondent entered into the agreement with the Appellant in 2013 it is unclear why the 1<sup>st</sup> Respondent chose to enter into an agreement for sale of ¼ Acre in 2017 with the 2<sup>nd</sup> Respondent when he had already become aware that he was only to get a portion of ½ Acre and he already had sold to the Appellant 1 Acre. The agreement of sale entered between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents was on 11/1/2017 and the search certificate of the same date shows land parcel No. Kabare/Nyangati/8201 was registered in the 1<sup>st</sup> Respondents name and the land was 0.2 Ha. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not make the Appellant a party to this agreement. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged there was a mutual agreement (though not written) with the Appellant, that he would share the suit land with the 2<sup>nd</sup> Respondent. If the 1<sup>st</sup> and 2<sup>nd</sup> Respondents saw the need to sign an agreement on 11/1/2017 why did they not see it fit to sign an agreement with the Appellant? There is doubt that there was indeed such a mutual agreement.
27. In my view the Respondents having regard to all the evidence led, did not prove the allegations of fraud to the required standard. Allegations of fraud are serious allegations and need to be proved through credible evidence. A party cannot allege fraud and leave it to the Court to infer fraud from the facts and/or pleadings. Fraud must be distinctly pleaded and distinctly proved through evidence. In the



Case of R G Patel –vs- Lalgı Makaanji (1957) E A 314 the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard may not be so heavy as to require proof beyond a reasonable doubt something more than a mere balance of probabilities is required.” See also the Case of Koinange (1968) KLR 23”

The Court of Appeal in the Case of Arthi Highway Developers Ltd –vs- West End Butchery Ltd & 6 Others (2015) eKLR echoed the same principle when it held thus:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt.”

28. In the present appeal the Respondents having failed to prove fraud, the Learned Trial Magistrate ought not to have impliedly found the Appellant to be at fault. The alleged oral mutual agreement the Learned Trial Magistrate relied on was not proved and did not at rate meet the requirement of Section 3(3) of the Law of Contract Act and was therefore of no legal effect. The Appellant was not party to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and in those circumstances the doctrine of constructive trust, which in any event was not pleaded, would not be applicable. There was simply no privity of contract between the Appellant and the 2<sup>nd</sup> Respondent. Although the Learned Trial Magistrate in making his finding appears to have been influenced by the fact that the 2<sup>nd</sup> Respondent was in possession and occupation of her portion it was not clear and/or apparent whether the portion she occupied was comprised in the portion that was registered in the Appellants name. That is because, the 1<sup>st</sup> Respondent was expecting to be awarded a portion of 2 ½ Acres from the original land and had sold the land to both the 2<sup>nd</sup> Respondent and the Appellant on that basis.
29. Be it as it maybe, upon reevaluation and consideration of the evidence before the subordinate Court, I am not satisfied the Learned Trial Magistrate was justified to reach the decision that he did. I find the appeal to have merit and I allow the same. I set aside the Judgment and orders of the Subordinate Court dated 27/1/2023 and substitute the Judgment and the orders thereof with an order dismissing the suit before the Subordinate Court with no order as to costs.
30. Each party will bear their own costs of the appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**J. M. MUTUNGI**

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**ELC - JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

