



**Wabala v Ngalu & another (Civil Appeal 236 of 2019)
[2025] KECA 95 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 95 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 236 OF 2019
MA WARSAME, JW LESSIT & WK KORIR, JJA
JANUARY 24, 2025**

BETWEEN

JONATHAN APPHUS OYALO WABALA APPELLANT

AND

VINCENT WABWILE NGALU 1ST RESPONDENT

EMILY NABWIRE WABALA 2ND RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Bungoma
(B.N. Olao, J) delivered on 22nd November 2018 in ELC Case No. 58 of 2005)*

JUDGMENT

1. In this appeal, one, Makhandia Ngalu (“Makhandia”), was the father to the appellant, Jonathan Apphus Oyalo Walaba, and a brother to the 1st respondent, Vincent Wabwile Ngalu (“Vincent”). The 2nd respondent, Emily Nabwire Wabala, is the administrator of the estate of Doris Nanzala Makhandia who was one of the wives of Makhandia and a stepmother to the appellant. Doris Nanzala Makhandia who was the 2nd defendant before the trial court passed on during the pendency of the case. Land parcel number W. Bukusu/Khasoko/146 (“suit property”), was at one point registered in the names of Makhandia, Vincent, and one, Waswa Ngalu Oyalo until 1973 when it was allegedly transferred to Makhandia and the appellant by the co-joint proprietors and subsequently to the appellant upon the demise of Makhandia.
2. The appellant moved the trial court asserting his right as the sole proprietor of the suit property. His claim against the respondents was that they had placed a caution on the suit property thereby demeaning his right to the property. He sought an order for removal of the caution and the costs of the suit. In their joint defence and counterclaim, the respondents denied the allegations put forth by the appellant and instead averred that the appellant unprocedurally and fraudulently acquired the registration of the suit property in his name. They sought to have entries numbers 2 and 3 on the



register of the suit property deleted and that the land ownership reverts to Makhandia, Vincent and Waswa Ngalu Oyalo.

3. In a judgment delivered on 22nd November 2018, Olao, J. dismissed the appellant's case and allowed the respondents' counterclaim. The learned Judge also issued an order that entries 2 and 3 on the register of the suit property be cancelled and that all parties were to bear their own costs.
4. The appellant, being dissatisfied with the said judgment, has approached this Court with five grounds of appeal, attacking the entire judgment generally that it was neither supported by the pleadings nor the evidence adduced in the trial court. We heard the appeal on 16th July 2024, when learned counsel, Mr. Omondi appeared for the appellant, and learned counsel, Mr. Murunga represented the respondents. Since counsel had filed their respective written submissions, they sought to rely on them accompanied by brief oral highlights.
5. The submissions for the appellant were dated 10th June 2024. Counsel condensed the 5 grounds of appeal into two issues which he proceeded to submit on. Learned counsel relied on *Selle & Another vs. Associated Motor Boat Company Ltd & Others* [1968] E.A. 123 to highlight the duty of the Court on a first appeal. Counsel proceeded to restate the evidence and faulted the learned Judge for finding that the appellant misrepresented the date of death of Makhandia. According to counsel, the appellant's evidence confirmed that his father died in 1980 contrary to the conclusion arrived at by the learned Judge. Learned counsel referred to the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR to point out that the standard of proof where fraud is alleged though not beyond reasonable doubt as in criminal cases, is higher than that required in ordinary civil cases. Mr. Omondi proceeded to submit that the onus of proving that the appellant acted fraudulently was borne by the respondents and they did not discharge that burden. It was also his submission that the 1st respondent had the onus of proving that the thumbprint on the transfer forms was not his. Counsel maintained that the evidence on record proved on a balance of probabilities that the respondents had relinquished their rights to the suit property before the death of his father. Counsel urged that the perceived misapprehension of the evidence by the learned Judge led to an erroneous judgment and that the mere misregistration of the transfer by the land registry could not amount to proof of fraud on the part of the appellant. Consequently, Mr. Omondi urged us to allow the appeal and set aside the judgment of the trial court.
6. On his part, the respondents' counsel filed submissions dated 24th June 2024. According to counsel, the appellant failed to prove his case against the respondents. Counsel reviewed the evidence on record and submitted that the respondents sufficiently established their interest in the suit property and that the particulars of fraud against the appellant were established to the required evidentiary standard. Counsel pointed out that section 80 of the [Land Registration Act](#) permitted the rectification of the register, if the registration was fraudulent or by mistake. Counsel relied on [Wambui vs. Mwangi](#) [2021] KECA 144 (KLR) and [Munyu Maina vs. Hiram Gathiba Maina](#) [2013] eKLR, to urge that the owner of a title under challenge should not merely dangle the title document but must prove that it was acquired procedurally and legally. In urging us to dismiss the appeal, counsel did not hesitate to point out that the appellant did not only rely on a forged death certificate but also failed to prove that the 1st respondent had relinquished his interests in the suit property upon being allocated a different parcel of land in Busia.
7. This being a first appeal, our mandate is akin to a retrial. Under Rule 31 (1) (a) of this Court's Rules, 2022, we are required to re-appraise the evidence and draw our independent inferences and



conclusions. This mandate was explained in *Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

In exercising the jurisdiction, we bear in mind and give room to the fact that we have not had the benefit that the trial court had of seeing and hearing the witnesses testify thereby being able to gauge their demeanour.

8. We have reviewed the record and the submissions by counsel for the parties. In our view, the crux of this appeal is whether the appellant’s title to West Bukusu/Khasoko/146 was indefeasible.
9. During trial, the appellant testified as PW1 and also called the District Land Registrar as PW2. According to the appellant’s evidence, the 1st respondent and his brother Waswa Ngalu moved away from their father’s home and went to stay with their uncles Michael Rubia and Sikwata Orinda. That the two inherited part of the larger family parcel of land in Busia. He also stated that in 1967 during adjudication, the suit parcel of land was registered in the names of Makhandia, Vincent and Waswa Ngalu. In 1973, Vincent and Waswa Ngalu voluntarily relinquished their interests in the suit property and signed documents to facilitate the transfer of the land to Makhandia. The appellant also testified that during this transfer, he implored his father, Makhandia, to make him (appellant), a co-proprietor of the suit property and his plea was granted. Further, that upon the death of his father in 1980, he become the sole proprietor of the property.
10. In rebuttal of the appellant’s evidence, the respondents called three witnesses, being the 1st respondent, Francis Nyongesa Ngalu and Alfred Buluma. Their case was that the appellant fraudulently acquired the registration of the suit property in his name. The 1st respondent (Vincent), further denied thumbprinting any transfer documents, asserting that he always signed his documents. He therefore disowned the transfer forms that he had allegedly thumb-printed.
11. As rightly appreciated by the trial court, the appellant’s claim to the suit property was premised on the provisions of section 118 of the repealed Registered *Land Act* which provided as follows:

“If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”
12. From the green card produced by the District Land Registrar, the record shows that Makhandia Ngalu, the 1st respondent and Waswa Ngalu Oyalo were registered as joint proprietors of the suit property on 1st November 1972. Entry number 2 shows that on 14th March 1973, the suit property was registered in the names of Jonathan Apphius Wabala (appellant), and Makhandia Ngalu who was deceased and the death certificate was noted as number 66xxx. On the same day, another entry, number 3, was made where the title was issued to the appellant.
13. From the evidence adduced during the hearing, it emerged that Makhandia died in 1980. The 1st respondent produced death certificate No. B87xxxx which showed that Makhandia died on 27th June 1980. The production of this death certificate and its authenticity was never challenged. By dint of section 83 of the *Evidence Act*, the contents of the said death certificate were sufficient to prove the fact that indeed Makhandia died on 27th June 1980.



14. If that is the case, how then could the title in favour of the appellant have been issued on 14th March 1973 upon presentation of another death certificate with a different number? Counsel for the appellant has in this appeal attempted to tender an explanation terming this as a “small misrepresentation in the register”. Such an explanation as tendered by the appellant shows lack of any other defence. The fact that the appellant was issued with a title in his name on 14th March 1973 blows away the explanation put forth by his counsel. This is not helped by the fact that the certificate of death allegedly produced to the Registrar in 1973 bears a different date from the genuine one of 1980. Maybe we could have been persuaded by such an explanation had entry number 3 been made way after the death of Makhandia Ngalu in 1980. However, as it is, there is no explanation why a wrong death certificate number would be indicated in an entry made 7 years prior to the death of Makhandia Ngalu. Such an entry stinks of an illegality and is a grave misrepresentation of facts.
15. The Land Registrar also produced transfer forms, the consent letter and the application form. The 1st respondent swiftly countered their authenticity and asserted that he did not sign any of the forms and that the thumbprint therein was not his. The provisions of sections 70, 71, 74 and 109 of the Evidence Act are of relevance in addressing the issues surrounding the contestation. They provide as follows:
- “70. Proof of allegation that persons signed or wrote a document.
- If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.
71. Proof of execution of document required by law to be attested.
- If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:
- Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.
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74. Proof where attesting witness denies execution.
- If the attesting witness denies or does not recollect the execution of a document, its execution may be proved by other evidence.
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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.”
16. In this appeal, counsel for the appellant has attempted to urge us to find that since the allegation of fraud was put forth by the respondents, the burden remained with them to prove that the appellant acted fraudulently. However, we cannot overlook the fact that it was the appellant who first lay claim



on the suit property and produced the documents allegedly thumb-printed by Vincent. It is also the appellant who claimed that the respondents had been sufficiently compensated and that they relinquished their interest in the suit property. That being the case, it follows that pursuant to the provisions of sections 70, 71, 74 and 109 of the *Evidence Act*, the appellant was under obligation to adduce further evidence to support his allegations, which he failed. Additionally, section 112 of the *Evidence Act* also requires that a person with facts within his personal knowledge has the burden of proving or disproving them.

17. Still on the issue of the transfer form which was allegedly attested to by the 1st respondent using a thumbprint, the 1st respondent denied ever attesting to those forms. According to him, he signed all his documents using a pen. This assertion by the 1st respondent was validated by the existence of a previously signed affidavit filed in Busia High Court Suit No. 16 of 2001 which was produced as an exhibit by the appellant. In other words, the appellant's own exhibits went against his case. The submissions by counsel for the appellant that the 1st respondent would have learnt how to read and write between 1973 and 2013 when the said suit was filed, is, in our view, far-fetched. Furthermore, no evidence was advanced to support the assertion. This Court cannot therefore operate on assumptions but based on facts as proved. We therefore find that indeed, on a balance of probabilities, the transfer forms were another fraudulent activity and were not signed by the 1st respondent.
18. To this extent, the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) aptly captured the law thus:

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.”
19. Upon perusal of the record, we are satisfied that the respondents established the particulars of fraud. There is no doubt that the appellant secured the registration of the suit land without consent or knowledge of the 1st respondent and the registration was also secured without any valid documentation. It is also discernable that the appellant, relying on a fake document misled the Land Registry into believing that Makhandia died in 1973 hence causing the suit property to be registered in his name.
20. Section 143 of the repealed Registered *Land Act*, Cap 300 provided that a court can order a rectification of the register if it was satisfied that any registration (other than a first registration) was obtained, made or omitted by fraud or mistake. This is exactly what the learned Judge did upon finding, just as we also have, that fraudulent actions and misrepresentation marred the acquisition of the title to the suit property by the appellant. We must also add that section 143 also referred to mistake so that even if we were to find (which is not the case), that the errors on the register was as a result of a “small misregistration”, the same would still fall within the scope of mistake thus liable for rectification.
21. In the end, we find that whereas the respondents acted legally under section 131(1) of the repealed Registered *Land Act* by lodging a caution to protect their interests in the suit property, the appellant on the other hand fraudulently acquired interests in that property. We are therefore obliged to uphold the judgment of the trial court. Consequently, we find this appeal to be without merit and we hereby dismiss it.
22. The final issue relates to the costs of the appeal. The general rule is that costs follow the event unless the court for good reason otherwise order. Although the parties in the appeal are family members, we take cognizance of the advanced ages of the respondents and the unnecessary litigation trip the appellant



has taken them through. In those circumstances, we are convinced that the appellant should shoulder the costs of the appeal and we so order.

23. In conclusion, this appeal is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

