



Arimba (Suing as the Legal Representative of the Estate of Isaac M'arimba alias Isaac Barimba - Deceased) v Mithiaru (Civil Appeal 140 of 2019) [2025] KECA 369 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 140 OF 2019
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
FEBRUARY 28, 2025**

BETWEEN

JOSEPH KABERIA ARIMBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ISAAC M'ARIMBA ALIAS ISAAC BARIMBA - DECEASED) APPELLANT

AND

MURIUNGI MITHIARU RESPONDENT

(Being an appeal from the Decree and Judgment of the Environment and Land Court at Meru (Cherono, J.) dated 18th October 2018 in ELC Appeal No. 15 of 2013.)

JUDGMENT

1. Before this Court is a second appeal. The appellant appeals from the judgment and decree of the Environment and Land Court at Meru (Cherono, J.) dated 18th October 2018 in ELC Appeal No. 15 of 2013.
2. A brief background of the matter is that the appellant filed a suit against the respondent in the Chief Magistrate's Court at Meru Civil Suit No. 462 of 2006 via plaint dated 6th November 2006 and sought the following orders:
 - a. A declaration that the excision of the respondent's land parcel no. Njia-Cia- Mwendwa/2405 from the deceased's land parcel no. Njia-Cia-Mwendwa-921, the purported transfer of the one acre of the deceased's land parcel no. Njia-Cia-Mwendwa/921 to the respondent and the subsequent registration of the said one acre as parcel no. Njia-Cia- Mwendwa/2405 in the names of the respondent was fraudulent and consequently unlawful;



- b. An order that the Meru-North District Land Registrar does rectify the register for the land parcel no. Njia-Cia-Mwendwa-2405 by cancelling the respondent's registration thereof and consequently registering the said land in the name of the deceased or the appellant;
 - c. An order of permanent injunction do issue restraining the respondent, his agents, servants, employees, assigns and legal representatives from interfering whatsoever in any way with the appellant's use, possession, occupation, management, development, and utilization of the land parcels nos. Njia-Cia-Mwendwa/921 and 2405;
 - d. Costs of the suit; and
 - e. Any other relief which the court may grant to the appellant.”
3. It was the appellant's case that Isaac M'Arimba (hereinafter the deceased) was the registered owner of land parcel no. Njia- Cia-Mwendwa/921 measuring about 5.10 acres. It was pleaded that between 7th May 1988 and 27th July 1988 the respondent secretly, fraudulently and unlawfully caused 1 acre of the deceased land to be transferred to him and consequently registered in his name as parcel no. Njia-Cia-Mwendwa/2405 by the Land Adjudication Officer. Further, it was argued that from 7th May 1988 to the date of instituting the suit the respondent had neither taken actual possession of the land parcel no. Njia-Cia-Mwendwa/2405, nor caused the parcel of land to be excised and demarcated on the ground from the deceased's land parcel no. Njia-Cia-Mwendwa/921.
 4. The particulars of fraud on the part of the respondent as alleged were inter alia:
 - a. making and presenting a false and an untrue allegation that the deceased sold him 1.00 acres from the land parcel no. Njia-Cia-Mwendwa/921;
 - b. making false presentation and untrue allegation to the Land Adjudication Officer that he was the brother to the deceased;
 - c. presenting to the Land Adjudication Officer a forged and falsified application for transfer allegedly made, signed and thumb-printed by the deceased;
 - d. making a misrepresentation before the Land Adjudication Officer that members of the deceased's family were aware of the alleged transfer of the one acre to him by the deceased and that the said family members had no objection to the transaction;
 - e. unlawfully causing interference and alteration on official records relating to the deceased's land parcel no. Njia-Cia-Mwendwa/921.
 5. Lastly, it was pleaded that on 11th October 2006 the respondent accompanied by a group of people unlawfully purported to sub-divide suit land with an intention of demarcating the land parcel no. Nia-Cia-Mwendwa/2405 therefrom and fencing off a portion of the suit land thus interfering with the appellant's occupation, use, management, utilization, possession and development of the suit land.
 6. The respondent entered an appearance on 15th November 2006 and filed his defence dated 17th November 2006 denying every allegation put forth by the appellant. It was his defence that in 1984 he purchased from the deceased one acre of land and later in 1988 the same was transferred to him and registered under his name as parcel no. Njia-Cia- Mwendwa/2405. He further pleaded that the deceased showed him the extent of his portion and thereafter beacons were placed by a surveyor and he took possession of the same. In conclusion the respondent pleaded that he could not create land parcel no. Njia-Cia-Mwendwa/2405 as the same already existed. He prayed that the suit be dismissed.
 7. The matter proceeded by way of viva voce evidence. Parties also filed their written submissions.



8. At the hearing thereof the appellant called six (6) witnesses. The appellant reiterated what he averred in his pleadings and we need not rehash the same. He maintained that the respondent fraudulently transferred the 1 acre of the suit land and caused it to be registered under his name. He testified further that his deceased father was semi-literate and therefore could not have written the transfer documents. He further disputed the identification card number of his deceased father as captured in the document and noted that the correct no. was 2375046 and not 2375046/6 and 2375046/65.
9. George Benard Owuor, an Adjudication Officer confirmed that they received an application for transfer of land dated 7th May 1988 where the deceased requested to be allowed to transfer portion of his land to a third party. He testified that they acted upon that request and issued a new title in the name of the transferee's name. Further, he confirmed that there were two different ID numbers captured and noted that he was not sure if new generation ID cards had a stroke and also confirmed that the deceased thumb printed the document. Mr. Owuor added that the transfer was on 27th July 1988 and the chairman of the committee approved the transaction by signing on the documents. He said that he could not tell who the chairman was and who recorded the documents.
10. Mungathia Preminus, the Assistant Chief of Etulo Sub- location confirmed he authored the letter dated 5th October 2006 addressed to the widow of the deceased, inter alia, requesting a meeting to facilitate the fixing of boundaries on parcel land no. Njia-Cia-Mwendwa/2405 by a surveyor. He testified that the exercise which was to take place on 11th November 2006 was abandoned after the deceased family opposed the same hence raising fear of violence erupting. Lastly, he confirmed that no boundary features had been fixed on the parcel.
11. Martha Kangai, widow of the deceased testified that the suit land belonged to her deceased husband and denied that her deceased husband sold 1.00 acre of the land to the respondent. She further testified that after the demise of her late husband, armed goons forcefully occupied a portion of the suit land and in the process assaulted her causing her injuries. Ali Gababa Alamch, a Clinical Officer at Igembe District Hospital testified that injuries sustained by Martha were classified as harm, and that she completed a P3 Form to that effect and produced it as an exhibit.
12. Lastly Samson Mwenda, a shamba boy working at the home of the deceased confirmed that he was present when the respondent and his armed goons invaded the suit land and assaulted Martha. He testified that later Martha reported the matter at Maua police station. He further testified that the respondent was cultivating the contested portion of land and no surveyor was involved.
13. On his part the respondent called two (2) witnesses. The respondent testified and maintained that the deceased sold to him a portion of the suit property for a consideration of KShs.50,000/- and that all the necessary steps were taken until the point where his name was registered against the parcel of land no. Njia-Cia-Mwendwa/2405. He said he gave his ID card for the transfer and that he thumb printed the relevant documents.
14. The respondent's witness, Joseph M'Berwaine Muthure explained that he was the Chairman of the Land Committee from 1984 to 2003. He confirmed a sale transaction between the deceased and the respondent and that the respondent bought the contested portion from the deceased. He confirmed signed the documents which he stated he did after the Adjudication Officer confirmed them. However he said that he did not witness any exchange of money in relation to the sale transaction as the same had already been concluded by the time he was involved in the matter. He further noted that there was no written agreement. Lastly, he clarified that the deceased and the respondent were referred to as brothers meaning they were from the same clan.



15. Hon. Ochieng, learned trial magistrate, in a judgment dated 24th January 2013, found that the respondent had committed fraud and ordered the rectification of the register for land parcel No. Njia-Cia-Mwendwa/2405 by cancelling the defendant's registration thereof and consequently registering the said land in the names of the deceased or the plaintiff. The learned trial magistrate gave an order of permanent injunction restraining the respondent, his agents, servants, employees, assigns and legal representatives from interfering whatsoever and in way with the appellant's use, possession, occupation, management, development and utilization of the land parcel no. Njia-Cia-Mwendwa/2405.
16. Aggrieved by the decision of the magistrate's court, the respondent filed his first appeal before the Environment and Land Court at Meru, being ELC Appeal No. 15 of 2013. The respondent faulted the learned magistrate for stating from the onset that the respondent had not filed a defence while a defence was filed and paid for on 17th November 2006; that his holding that there was no defence influenced his final findings in the judgment; for allowing the appellant's claim based on evidence that actually supported the respondent's case; in failing to appreciate the law on first registration of the title; by misapprehending the Law of Contract as far as the sale of unregistered land in an adjudication section was concerned; that while acknowledging a written document existed between the parties nevertheless dismissed it as mere speculation but of no legal effect; and, by relying on minor discrepancies on the identity card to arrive at a wrong finding.
17. In the first appeal in a judgment dated 18th October 2018 the learned Judge of the ELC, Cheron, J. held that having re- evaluated the evidence adduced by the appellant and his witness one Owuor, the Land Adjudication Officer, it became apparent that the deceased was the one who wrote him the letter dated 7th May 1988 in which he requested a transfer of one acre from his parcel of land to the respondent, and that the said letter also contained the National Identity card of the deceased vendor as No. 2375046/65 and that the evidence of the appellant and Mr. Owuor clearly showed that the deceased willingly wrote a letter requesting to sell one acre of his land to the respondent.
18. The learned Judge also held that the Adjudication Officer was not bound to apply the provisions of the Law of Contract in establishing claims and interests in an adjudication action and, therefore found that the trial magistrate misdirected himself in law and in fact by misapprehending to the evidence adduced by the witnesses particularly the appellant and Mr. Owuor.
19. The learned Judge also found that the evidence adduced before the trial court did not prove any fraud or misrepresentation to which the respondent was a party. He found that there was no evidence showing that the transfer document which was presented by the deceased to the Land Adjudication Officer was forged. In fact, the said officer confirmed that the same document was genuine.
20. Lastly, the learned Judge found that the trial magistrate misapprehended the evidence adduced by the respondent and his witness therefore arriving at a wrong decision. Further, he held that the respondent, the Adjudication Officer and Land Committee Chairman were the only witnesses present in the sale transaction in the year 1988. The learned Judge found their evidence candid and truthful.
21. In conclusion therefore the learned Judge found that the decision of the trial magistrate must be interfered with and therefore made the following orders:
 1. "The trial magistrate's judgment issued on 24/01/2013 be and is hereby set aside.
 2. That the said judgment is replaced with an order dismissing the said suit with costs to the respondent.
 3. That the costs of this appeal shall also be borne by the appellant."



22. Aggrieved by the judgment of the High Court, the appellant preferred this appeal to this Court. In his memorandum of appeal dated 14th June 2019 the appellant faults the learned Judge on nine (9) grounds. Among the grounds raised were that the learned Judge erred for finding that there was an agreement of sale between the appellant's father and the respondent; finding that the transfer document which was used to transfer one (1) acre out of the deceased parcel of land was genuine and authentic; and, for relying on extraneous matters that were not presented in court.
23. We have considered the nine grounds and find that what arises for our determination is:
- i. Whether the learned Judge of the first appellate court erred to find that the transaction between the deceased vendor and the respondent was not tainted with illegality or irregularity and was compliant with the relevant law;
 - ii. What orders we should make.
24. At the hearing of this appeal through this Court's virtual platform that was on the 14th October, 2024, present was learned counsel Ms. Mugo for the appellant and learned counsel Mr. Karanja for the respondent. They both expressed their wish to rely on their written submissions dated 16th March 2023 and 28th March 2023 respectively, without the need to highlight.
25. We have considered this appeal, the submissions by both counsel and the law applicable. This being a second appeal from the decision of first appellate court in Meru ELC Appeal No. 15 of 2013 and we are restricted to determining points of law and not of fact as set out under section 72(1) of the *Civil Procedure Act*, and explained by this Court (Waki, Karanja & Kiage JJ.A.) in the case of Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR as follows:
- “...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
- We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”
26. The bone of contention is the validity of the transfer of the suit land to the respondent. In the submissions of Ms. Mugo for the appellant, she urged that there was no sale agreement between the respondent and the deceased vendor, and thus the transaction was invalid. The appellant contended that as there was no written sale of land agreement the mandatory provisions of section 3(3) of the *Law of Contract Act* (hereinafter LCA) were not met. Counsel urged further that the documents presented to the Land Adjudication Officer for the transfer of 1 acre from the deceased vendor's land was full of errors and could not have been from the deceased.
27. Mr. Karanja on his part regarding the application of section 3 (3) of the LCA urged that prior to the amendment of the LCA in 2003 oral agreements of sale were allowed, and for that proposition he relied on this Court's decision in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited (Civil Appeal No. 48 of 2015) [2017] KECA 152 (KLR) (Civ) (1 December 2017). As to whether the transaction culminated in the sale of land counsel urged that the appellant demonstrated that there was an agreement for sale on land parcel no. Njia/Cia – Mwendwa/2405 between him and the deceased hence the transfer he submitted was genuine and due process followed to the latter. It was common



ground that the deceased and the respondent thumb printed the transfer document which document was countersigned by the land committee chairman and the adjudication officer. In support he relied on the case of Republic vs. District Land Adjudication Officer, (Trans-Mara District) Samson Kiserian Kilerai [2012] eKLR where the court described the powers of a land adjudication officer.

28. The appellant's claim before the trial court was that the respondent had defrauded the vendor of the land which he caused to be registered in his name. He pleaded; 'that between 7th May 1988 and 27th July 1988 the respondent secretly, fraudulently and unlawfully caused 1.00 acres of the deceased land to be transferred to him and consequently registered in his name as parcel no. Njia-Cia-Mwendwa/2405 by the Land Adjudication Officer'. This makes it clear that the alleged fraud was committed during the Adjudication process, before the adjudication was over and before registration of the suit land and issuance of title. The appellant pleaded particulars of fraud among them; 'presenting to the Land Adjudication Officer a forged and falsified application for transfer allegedly made, signed and thumb-printed by the deceased'.
29. The learned ELC Judge considered the evidence adduced before the trial court and after analyzing the same came to this conclusion:

“Having re-evaluated the evidence given by the Plaintiff/Respondent and his witness George Benard Owour (PW3) it becomes apparent that the deceased Isaac M'Arimba alias Isaac Barimba is the one who wrote a letter dated 7/5/1988 which he requested to transfer one acre from his parcel of land to the Defendant/Appellant. The said letter also contains the National Identity card of the said vendor Isaac M'Arimba alias Isaac Barimba No. 2375046/65. The evidence by the plaintiff and George Benard Owour clearly shows that the deceased Isaac M'Arimba alias Isaac Barimba willingly wrote a letter requesting to sell one acre of his land to the Appellant...

The approval by the Land Committee Chairman and the Land Adjudication Officer is sufficient proof that they knew the parties and that the transaction was genuine...”

30. The learned Judge found that section 12 of the *Land Adjudication Act* applied, observing that:

“The Adjudication Officer was not therefore bound to apply the provisions of the law of Contract Cap. 23 Laws of Kenya in establishing claims and interest in an Adjudication Section. I therefore find that the trial magistrate misdirected himself both in law and in fact by misapprehending the evidence adduced by the witnesses particularly the Plaintiff and PW3.”

31. The Judge found that the sale transaction between the deceased vendor and the respondent and the eventual transfer was supported by the evidence adduced by the appellant and the respondent. The witnesses included the Land Adjudication Officer to whom the deceased vendor presented the letter dated 7th May 1988 requesting to transfer 1 acre out of his land to the respondent. In the presence of the Adjudication Officer, the vendor and the respondent both appended their thumb-prints on the transfer documents and presented their identity cards to be recorded on the said documents. The other witness was the Chair of the Land Committee. The learned ELC Judge concluded thus:

“The plaintiff/Respondent himself produced in evidence a letter which his late father wrote to the Land Adjudication Officer requesting to transfer one acre of his land to the Defendant/Appellant. The Land Adjudication Officer (PW3) in his testimony confirmed the authenticity of that letter and also stated that that was the procedure when a party wishes to sell a parcel of land in an adjudication area. The sale transaction was even approved



by the Chairman of the Land Committee one, Joseph M’Berwaine Muthure (DW2) who confirmed that the two parties appeared before him and that the seller (deceased) even confirmed to him that he had been paid the purchase price.

My re-evaluation of the evidence does not prove any fraud or misrepresentation for which the Defendant/Appellant was a party.”

32. The registration in respect of the deceased vendor and the respondent were clearly first registrations and the law regarding them is clear. Section 28(1) of the *Land Registration Act* and states as follows:

“26 (1) The certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

33. The *Land Adjudication Act* (the Act) governs the process of ascertaining land interests in an adjudication area, complete with an in-built dispute resolution mechanism. That was the reason the deceased vendor and the respondent went to the Land Adjudication Officer for the transfer process in 1988. Any complaints should have been raised before the Land Adjudication Officer, and if necessary, the dispute resolution mechanism would have been activated to resolve the dispute. However, we note, this challenge arose in 2006 with the suit filed before the Magistrate’s Court. We say no more.

34. The question of fraud is a matter of evidence that needed to be particularly pleaded and proved. The trial magistrate found that fraud was not proved. The learned ELC Judge evaluated the evidence afresh and found no proof of fraud either. We have examined his analyses and find that he came to the correct conclusion. He cannot be faulted.

35. After careful consideration of this appeal, we find that the transfer of the 1 acre of land to the respondent was done by the deceased vendor himself, sanctioned by the Land Adjudication Officer of the area and the Chairman of the Land Committee of the respective area. The two titles were issued subsequent to the impugned transfer and are absolute, indefeasible and protected under section 26(1) of the *Land Registration Act*.

36. The result of the appeal is that the same lacks in merit and is dismissed in its entirety. The judgment of the ELC Appeal Case No. 15 of 2014. Cherono, J., is upheld. Costs to be borne by the appellant.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF FEBRUARY, 2025.

S. OLE KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL



ALI – ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

