King'ara & another v Njonge & another (Civil Appeal 77 of 2019)
[2025] KECA 489 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KECA 489 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 77 OF 2019

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MARCH 14, 2025

BETWEEN

MARGARET NYAMBURA KING'ARA ..... 1ST APPELLANT

JOHN WAITHAKA KING'ARA ..... 2ND APPELLANT

AND

FRANCIS KIMANI NJONGE ..... 1ST RESPONDENT

GATHIGIRIRI FOUNDATION COMPANY ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Environment & Land Court of Kenya at Nakuru (M. Sila, J.) dated 27th June, 2019 in ELC No. 148 of 2015)

JUDGMENT

1. By a plaint dated 15th May 2015, Margaret Nyambura King'ara and John Waithaka King'ara (the appellants) sued Francis Kimani Njonge and Gathigiriri Foundation Company (the respondents) at the Environment and Land Court (ELC) at Nakuru in ELC Case No. 148 of 2015. Their case was that late Daniel Njonge Kinara-deceased held Land Parcel No. Gilgil/Gathingiriri Karangu Block 10/533 (the suit land) in trust for the family. It is common ground that the 1st appellant was a niece to the deceased while the 2nd appellant was a brother to the deceased. It was also common ground that the deceased was the first-born son in the family. The appellants maintained that in that capacity the deceased was registered as the proprietor of the above land to hold in trust for the family. The 1st appellant averred that she was born and raised on the said land, and, that her children were born and grew up on the said land where they all still live to date.

2. The appellants claimed that upon the demise of the deceased, they learnt that the 1st respondent had registered the suit land in his name on 4th July 2011 without involving the rest of the family despite being aware that his father (the deceased) held the land in trust for the rest of the family.

3. It was also averred that the 2nd appellant's mother continuously paid for the suit land at the 2nd respondent's offices for shares then identified as Plot No. 80 which was subsequently registered as the suit land, and that the 1st respondent with the help of the 2nd respondent secretly registered himself as the proprietor of the land.

4. The appellants prayed for the following orders against the respondents: (a) the defendants, agents, servants and/or employees be restrained from interfering, subdividing, transferring or meddling in any way with LR No. Gilgil/Gathigiriri Karunga Block 10/533; (b) permanent injunction against the defendants, servants, agents and/or employees from trespassing, subdividing, disposing and/or interfering in any manner whatsoever with LR No. Gilgil/Gathigiriri Karunga Block 10/533; (c) the current title deed in the name of the 1st defendant be cancelled as it was obtained fraudulently without following the due process in law, or involving all beneficiaries of the former registered owner at the 2nd defendant's records; (d) costs of this suit; (e) interest thereon; (f) any other relief this Honourable Court might deem fit and just to grant.

5. In his defence dated 26th June 2015, the 1st respondent denied the appellant's claim and maintained that the 1st appellant was at all material times married to one Anthony Macharia with whom she had several children and therefore, she has never lived on the land in question. He admitted that the 2nd appellant was his father's brother but denied that the said land was held in trust for him. He also denied that the 2nd appellant's mother paid money towards the purchase of the said land and that no fraud was committed by him.

6. Notably, no appearance or defence was filed on behalf of the 2nd respondent, even though both respondents were represented by the firm of M/s Wambui Ngugi & Company advocates during the trial, who also filed submissions on behalf of both respondents.

7. In support of their case, the appellants called 4 witnesses, while the 1st respondent called 3 witnesses. Upon considering diametrically opposed evidence tendered by the parties in support of their respective positions, in a judgment delivered on 27th June 2019, Sila, J. was not persuaded that the suit land was ever held by the late Daniel Njonge Kinara in trust for the rest of the family. The learned judge noted that the transfer of the share to the 1st respondent was done when the deceased was still alive. Further, even though the title was processed after the deceased's death, the shares had already been transferred to the 1st respondent (the deceased's son), and only the formal documentation for processing the title was pending. The learned judge found no evidence to suggest that the transfer was tainted by fraud nor did he find any reason to impeach the 1st respondent's title.

8. Aggrieved by the above verdict, the appellants appealed to this Court citing 11 grounds of appeal in their memorandum of appeal dated 3rd July 2019 which can be reduced to 6 grounds as follows: (a) the decision was not supported by evidence; (b) the court failed to find that the land was not held in trust for the family; (c) the court erred in rejecting the appellants claim that they paid for the land and their supporting documents were lost in a fire; (d) the court failed to appreciate that the land was bought as a share in the deceased's name who was to hold it in trust for the family, and, (e) failed to find that the title was obtained fraudulently. The appellants pray for the following orders: (a) their appeal be allowed; (b) the respondents be restrained from sub-dividing, and or transferring or meddling in any way with the suit property.

9. At the hearing of the appeal, learned counsel Ms. Nyambura appeared for the appellants while learned counsel Ms. Wambui was present for the 1st respondent. Both parties highlighted their written submissions.

10. On behalf of the appellant, Ms. Nyambura maintained that the suit property was registered in the deceased's name because he was the first born son in the family, and, under Kikuyu culture, he was regarded as a father figure, furthermore, the deceased's mother did not have an identity card, therefore, the property could not be registered in her name, as such the learned judge erred in not finding that the appellants were disinherited by the deceased. He also erred in holding that the deceased did not hold the land in trust for the appellants. Counsel also submitted that the learned judge erred when he expected documentary evidence from the appellants when it was confirmed by DW3 that the documents in support of their claim were burnt in their house. Accordingly, it was unfair and unjust for the learned judge to subject the appellants to such demands. Further, deceased, who was also the farm manager of the land in issue, also had documents pertaining to the suit land.

11. M/s Nyambura maintained that the land was bought as a share in the deceased's name, (which was the norm with all land bought through shares). Under the said arrangement, regardless of whether the appellants paid directly to the 2nd respondent or gave money to the deceased to pay, the receipts would be issued in the deceased's name because as the first born according to kikuyu custom, he was to hold the land in trust for the family. Counsel cited this Court's decision in Henry Mukora Mwangi vs. Charles Gichina Mwangi [2013] eKLR in support of her contention that under kikuyu customary law, the eldest son inherits land as a Muramati to hold it in trust for himself and other heirs.

12. Counsel argued that the appellants long stay and possession of the land is consistent with a claim under customary trust and cited the decision Mbui Mukangu vs. Gerald Mutwiri Mbui [2004] eKLR in support of the proposition that for to establish a claim on customary trust, one must prove actual possession or occupation of the land. Ms. Nyambura also argued that the 1st respondent's mother in her testimony stated that the 2nd appellant was still young when the land was acquired, therefore, she could not have had an identification card. She contended that it was mysterious that the land was transferred to the 1st respondent barely less than a month before the deceased's death, and contended that considering the deceased's terminal illness, his state of mind could not allow him to freely transfer the land.

13. Ms. Nyambura faulted the learned judge for finding that the 1st appellant was a mere licensee yet DW3 who was the deceased's wife testified that the 1st appellant was born and raised on the suit land and that the deceased was the registered custodian of the land and therefore, there is a presumption of continuance and uninterrupted occupation since the 1st appellant occupied, grew up and have continued to live on the suit property since the 1960's without permission and consent of the deceased and therefore she enjoys protection under section 30 (f) of the Registered *Land Act* as an overriding interest and there is also no evidence that the 1st appellant was a licensee.

14. In addition, the appellants' counsel maintained that the 1st respondent manipulated a terminally ill man to transfer the share certificate into his name without any supporting documents, therefore, the 1st respondent obtained the title in his favor using uncorroborated document and thus defrauded his relatives. Counsel argued that the learned judge erred in failing to find that there was fraudulent dealing on the part of the 1st respondent and cited the case of Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR in support of the holding that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership.

15. Regarding the share certificate, Ms. Nyambura submitted that the 2nd respondent did not have authority to sign on behalf of the other family members and that the share certificate in favour of the 1st respondent was a sale and not an inheritance.

Therefore, there was mischief between the 1st respondent and his mother (DW3) considering that the deceased had two wives and many other children and it therefore beats logic why the deceased transferred or sold the entire land to the 1st respondent on his death bed. Counsel questioned why the deceased held the land for his life time only to transfer it at the time of his demise, particularly so, when he was housed by the 1st respondent.

16. Counsel submitted that the learned judge was biased because it was clear to him that the deceased was the 2nd respondent's manager when the share was bought, and as the eldest brother to the appellants, he held the documents for the land. Therefore, expecting the appellants to produce receipts was far beyond the requirement standard of proof on a balance of probabilities, and, in any event, the 1st respondent did not produce any documents, and DW3 testified that the payment receipts got burned in a fire. Counsel cited this Court's decision in Jubilee Insurance Company Ltd vs. Zahir Habib Jiwan & Another [2017] eKLR in support of the holding that where documentary evidence in not available, other form of cogent evidence may be adduced to prove ownership and the value of the property.

17. In conclusion, Ms. Nyambura maintained that the learned judge erred in holding that the appellants had no base or strong attachment to the land simply because their mother and deceased sibling were not buried there. Furthermore, it is also a fact that the 1st respondent never lived on the land and neither did his mother nor his siblings who are all settled in Mwea. Therefore, it was not proper for the learned judge to ignore that the 1st respondent was only entitled to their father's share on the land.

18. On the part of the respondent, Ms. Wambui submitted that the history of the land was highlighted by the 1st respondent and the ownership documents were produced in court. Citing Section 107 of the *Evidence Act* in support of the principle that he who asserts must prove, counsel maintained that the appellants failed to discharge the onus of proof as required by the law.

19. Addressing the argument that the deceased held the land in trust for the appellants, Ms. Wambui submitted that at no one time did the appellants adduce evidence to show that they contributed money towards the purchase of either shares or the land and that is why the share certificate was issued to the deceased. Besides, the 2nd appellant was barely 11 years old when he, his mother and his other siblings settled on the land, therefore, he could not raise any money towards the purchase of the land. Further, the deceased did not inherit the land from his father as alleged by the appellants. Counsel cited this Court's decision in Mwangi Mbothu & 8 Others vs. Gachira Waitimu & 11 Others [1986] eKLR in support of the holding that the law never implies a trust, the court never presumes a trust, save in order to give effect to the intentions of the parties, which must be clearly demonstrated before a trust can be implied.

20. Regarding whether the title was obtained fraudulently, Ms. Wambui submitted that the deceased was a member of the 2nd respondent, and he bought shares in the said company and upon payment, he was issued with a share certificate dated 24th July, 1977. Through this, he was allocated parcel number 533, now the suit land. Being the lawful owner of the land, he freely transferred the same to the 1st respondent in 2011, who was issued with a share certificate on 25th May 2011. The 1st respondent got clearance certificate from the 2nd respondent which enabled him to obtain a title for the land.

21. In conclusion, Ms. Wambui maintained that the appellants cannot claim beneficial interest over the land because it was never held in trust for them. Counsel contended that the 1st appellant was initially married and it was only after she differed with her partner that she went to live on the land, while the 2nd appellant was only brought up on the land after his brother, (the deceased), invited their mother to live on the land. As a matter of fact; the 2nd appellant has been living in the United States. Moreover, the deceased took in his mother together with his other siblings after she separated from her husband.

Counsel questioned why out of all the deceased's relatives, it is only the appellants who are claiming that the land was held in trust for them. He also questioned why this suit was instituted after the deceased's death. Lastly, counsel maintained that the appellants lack the locus standi to institute this suit because they are not beneficiaries of the deceased's estate.

22. This is a first appeal to this Court, therefore, it is by way of retrial. We are required to reconsider the evidence and arrive at our own independent conclusions. (See Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212). However, we must bear in mind that unlike the trial court, we neither saw nor heard the witnesses testify and we should make due allowance in this respect. In particular this Court should be slow to overturn findings of fact arrived at by the trial court, unless it is demonstrated that such findings are not based on evidence or are palpably wrong or if the trial court failed take into account relevant considerations or it took into account irrelevant considerations. (See Abdul Hameed Saif vs. Ali Mohamed Sholan [1955], 22 E. A. C. A. 270).

23. The germane issue for determination is whether the deceased held the disputed land in trust for the family. Closely tied to this issue is the question whether the deceased solely purchased the said land or whether the family members, and in particular, the appellants contributed towards its purchase. It was the appellants' case that under Kikuyu custom, the eldest son usually holds the land in trust for himself and the other heirs and therefore the registration of the suit land from the deceased name to the 1st respondent's name did not extinguish the trust. On the other hand, the 1st respondent maintained that the appellants never demonstrate by evidence that they contributed towards the purchase of the land or the existence of a trust. The 1st respondent maintained that the appellants were mere licensees on the suit land.

24. The above issue will turn on the question whether the appellants proved their case against the respondents on a balance of probabilities, which is the standard of proof in a civil case. This entails that the Plaintiff, who bears the burden of proof, must prove that his version is more probable than that of the defendant. As was held by this Court in Kimweli vs. Kimweli (Civil Appeal 660 of 2019) [2022] KECA 1394 (KLR) (16 December 2022) (Judgment):

> " Undeniably, whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. As Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4 SLR 855 at 59 stated:
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> "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

25. In Kimweli vs. Kimweli (supra), this Court states as follows:

> " Whoever desires a court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. 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. A plaintiff must prove his case on the balance of probabilities before the defendant can rebut them. A court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722 (HL) at 733 must be carefully distinguished from conjecture or speculation:

"There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation."

26. Before the trial Court, the parties presented diametrically opposed factual positions. The trial court was tasked with the duty of evaluating the completely conflicting factual positions and arrive at the correct finding, that is, which of the two versions was more probable than the other. In resolving this issue, we may profitably benefit from the often-cited decision of the South African Supreme Court of Appeal in Stellenbosch Farmers Winery Group Ltd & Another vs. Martell & Others, 2003 (1) SA 11 (SCA) at para 5, in which the Court explained how a court should resolve factual differences and ascertains as far as possible where the truth lies between conflicting factual contentions. It stated:

> " To come to a conclusion on the disputed issues, a court must make findings on:
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> i. The credibility of various factual witnesses;
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> ii. Their reliability; and
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> iii. The probability or improbability of each party's version on each of the disputed issues
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> In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the lessor convincing will be the latter. But when all factors equipoised, probabilities prevail." (Emphasis added).

27. Granted, where the onus rests on the plaintiff, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. (See Kimweli vs. Kimweli, supra).

28. With the above jurisprudence in mind, we now examine the learned judge's findings. Regarding the question whether the deceased held the land in trust for the family, the learned judge stated:

> " 19. ..Despite claiming that the siblings to Daniel and his late mother contributed towards the purchase of the suit land, no documentary evidence was produced to back up this allegation. It is common knowledge that when one makes payment, one is issued with a receipt, and if the 2nd plaintiff alleges that he did make payment towards the purchase of the land, you would expect that he would have some documentary evidence to back up this claim. None was

presented and in the absence of these, I find it difficult to believe the assertion of the plaintiffs that the siblings of the deceased contributed towards the purchase of this land. Even without documentary evidence, it is apparent that the suit land was purchased when the 2nd plaintiff was pretty young. In as much as he tried to claim that he was a caddie in a golf course and also did photography, I was not convinced by his evidence. He was a young boy of 12 or so years and was going to school, and again without something more tangible to back up the oral assertion that he was working part time at that age and contributing money, I am not persuaded by his allegations. It seems to me that the late Daniel was a hard-working man who could take care of himself and the rest of the family, and I find it hard to believe that he could ask his 12-year-old brother to help him pay for the land, while at the same time educating him. It simply does not add up for me.

20. I am more persuaded by the explanation that Daniel, in order to help his mother and his siblings, and having purchased the suit land for which he had little use of since he lived in Mwea, decided to settle his mother and siblings here so that they may have a place to stay. If this were not the position, you would expect the whole of his siblings to have some sort of base here, but none has. You would also expect that when either of his siblings died, then they would be buried here, if this was family land, but they were not. Neither did his father make Gilgil his home and never constructed a house here, and would only make occasional visits. These are not the type of facts that lead one to the conclusion that the family has bought the land. If they had, you would expect very strong attachment to the same, which to me is considerably lacking."

29. For starters, the above findings are principally matters of fact.

Therefore, for this Court to differ from the decision arrived at by the learned judge, we must be persuaded that the trial court is palpably wrong or the decision is inter alia based on no evidence. We cannot substitute the decision with our own even if we were to arrive at a different conclusion if the matter was before us. It is trite law that the existence of a trust is considered to be a matter of fact that must be proven through evidence presented in court, meaning the burden of proof lies on the party claiming the trust exists. This principle has been consistently upheld by our superior courts in various court decisions, including cases where customary trusts are asserted, emphasizing that courts will not presume a trust without clear evidence demonstrating the intention to create one. (See Gichuki vs. Gichuki [1982] eKLR). The party alleging a trust must present sufficient evidence to prove its existence, as the court will not automatically assume a trust exists. In this regard, the Supreme Court in Isack M'Inanga Kiebia vs. Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari, Petition No. 10 of 2015 was categorical that customary must be proved exist.

30. Did the appellants prove by evidence the existence of the alleged trust in relation to the suit property? The appellants in their evidence stated that since the deceased was the first- born son in the family, he held the land in trust for the family. This statement is attractive on the face of it. But, that is how far it goes. One would have expected evidence pointing to either a family meeting where such a decision was arrived at, or a clear statement attributed to the deceased's father (the patriarch), who was alive then, clearly communicating this fact to his family. Also, a statement attributed to an elder in the village or an independent witness could have shed some light.

31. It was alleged that the deceased was a manager in the 2nd respondent, therefore, he was a custodian of all the documents because all the payment receipts were handed over to him. Also, the appellants stated

that the documents they could have produced in support of their case were burnt in a fire. In our view, it is not enough to allege that such crucial documents were burnt. A litigant is expected to always put his best foot forward and present the best evidence in support of his/her case. The receipts are alleged to have been issued by the 2nd respondent. There was no attempt at all to procure copies of the receipts from the 2nd respondent, to demonstrate to the court that the document in support of their case is in the hands of their adversary, and as the law permits issue a notice to the 2nd respondent to produce copies of the documents.

32. More important, the evidence alleging that the receipts were issued to the deceased regardless of who paid and/or they were burnt is not to be viewed in isolation. A trial court is required to sieve and consider all the evidence presented before it in a holistic manner. In this regard, the learned judge went an extra mile and considered the oral evidence by the 2nd appellant. However, he was not persuaded the payment was made as alleged. In rejecting the appellants' version, the judge noted that the 2nd appellant was only 12 years old at the time of the purchase, and he was not persuaded that he was earning at that point in time. The learned judge also noted that none of the other family members claimed the land. Indeed, if it was family land, the learned judge was not satisfied that an explanation was provided why other family members settled at Mwea and they were not claiming the land, nor was any of the deceased's family members buried on the land. Upon evaluating the totality of the evidence as abridged above, the judge was not satisfied, as we are also, on a balance of probabilities that the deceased held the land in trust for the family or the existence of customary trust. As decided cases suggest, the existence of trust is a matter of fact and it must be proved by way of evidence. It cannot be inferred. As Lord Brandon in Rhesa Shipping Co SA vs. Edmunds [1955] 1 WLR 948 at 955 remarked:

> " No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

33. The other ground urged by the appellants is that the land was fraudulently registered in the 1st respondent's name. The appellants maintained that the shares were sold to the 1st respondent when his father was terminally ill and on his death bed and that he died a month later while under the 1st respondent's custody after the land was transferred. It was also the appellants' case that there was collusion between the 1st respondent and his mother, DW3, since it beats logic why the deceased would leave the entire suit land to the 1st respondent yet he had another wife and children. On the other hand, the 1st respondent submitted that his father bought shares from the 2nd respondent and upon payment of the requisite fees, he was issued with a share certificate dated 24th July,1977. Through this, he was allocated parcel no. 533, which in essence is the suit land. Being the lawful owner of the suit land, he freely transferred the same to the 1st respondent in 2011, who was issued with a share certificate on 25th May, 2011. Thereafter, the 1st respondent got a clearance certificate from the 2nd respondent thus he was able to obtain a title deed for the land.

34. Decided cases are in agreement that allegations of fraud must be distinctly pleaded and strictly proved, requiring specific details and evidence of conscious and deliberate dishonesty. The pleadings must contain a distinct pleading alleging fraud and particulars constituting the alleged fraud. Simply put, claims of fraud must be clearly and specifically pleaded, providing details of the alleged fraudulent conduct, rather than vague or ambiguous language.

35. The standard of proof for fraud is higher than the ordinary civil standard of proof on a balance of probabilities, requiring evidence of especially high strength and quality. The burden of proving fraud rests on the claimant, meaning they must adduce sufficient evidence to establish the elements of

fraud. Fraud involves conscious and deliberate dishonesty, and not merely negligence or recklessness, therefore, the evidence must establish this requirement. The dishonest conduct must be material to the alleged fraud. This Court in Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR, this Court addressing the issue of fraud stated:

> " 25. ...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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."

36. Regarding the strict requirement that fraud must be strictly pleaded, we have considered the appellant's plaint dated 15th May, 2015. It is noteworthy that the first time the appellants make reference to the issue of fraud was in the prayers sought in their plaint. In the body of their plaint, there is no single averment citing fraud. In the prayers, it is stated:

> "The current title deed in the names the 1st defendant be cancelled as it was obtained fraudulently without following the due process in law, or involving all the beneficiaries of the former registered owner at the 2nd defendant's records."

37. Strictly speaking, the above prayer is not an averment.

Conversely, prayers flow from the averments. The below cited excerpt from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427 is illuminating on the subject:

> " Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).
>
> The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|Davy V Garrett (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount o an averment of fraud of which any court ought to take notice". (Emphasis added.)

38. It is evidently clear that no particulars of fraud were pleaded nor are the specific acts constituting fraud particularized anywhere in the plaint dated 15th May, 2015. Equally important, from our own evaluation of the evidence on record, we find that the trial Judge cannot be faulted for finding that fraud was not proved. The appellants simply alleged fraud but their evidence fell far short of what is required to prove fraud. In any event, having failed to plead fraud in their plaint, their claim fails on that test.

39. Even though the learned judge did not address his mind to the appellants' failure to plead fraud in their plaint, he addressed his mind to the evidence before him to satisfy himself as to whether fraud had been proved. The learned judge analyzed how the 1strespondent acquired his title and correctly concluded that there was absolutely nothing to suggest that the title was fraudulently acquired. In any event, from

our own evaluation of the evidence on record, we are satisfied that the appellants merely alleged fraud, but they led not evidence to prove its existence as the law and decided cases require.

Having failed to specifically plead and/or particularize the elements of fraud, it was impossible for the appellants to prove fraud since their plaint was in violation of Order 2 Rules 10 of the Civil Procedure Rules which requires that pleadings should be clear and particulars relied upon must be pleaded.

40. Flowing from our analysis of the law, the evidence, the issues discussed above and the conclusions arrived at, we find that the appellants' appeal against the judgment issued by Sila, J. on 27th June 2019 in Nakuru Environment & Land Court No. 148 of 2015 is devoid of merit, therefore, we find no reason to interfere with it. Accordingly, we dismiss this appeal with costs to the 1st respondent.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF MARCH, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR