



**Ikiara v M'mwarania & 2 others (Civil Appeal 60 of 2019)  
[2025] KECA 959 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 959 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 60 OF 2019  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
APRIL 4, 2025**

**BETWEEN**

**ZACHARIA KIRUKI IKIARA ..... APPELLANT**

**AND**

**SHADRACK MWITI M'MWARANIA ..... 1<sup>ST</sup> RESPONDENT**

**JANET MARINGA M'IKIARA ..... 2<sup>ND</sup> RESPONDENT**

**EVANJELINE NKIROTE M'IKIARA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Meru (L.N. Mbugua, J.) dated 17th October 2018 in ELC Case No. 6 "A" of 2011)*

**JUDGMENT**

**Background**

1. Zacharia Kiruki Ikiara (the appellant) sued Shadrack Mwiti M'Mwarania, Janet Maringa M'Ikiara and Evanjeline Nkirote M'Ikiara (the 1<sup>st</sup> to 3<sup>rd</sup> respondents) herein regarding land parcel No. NKUENE/U-MIKUMBUNE/5X4 (the suit land).
2. The brief facts of the case were that the suit land was initially owned by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's father, M'Ikiara Magiri (the Deceased). From the record, the suit land is currently registered in the appellant's name. The appellant and the 1<sup>st</sup> respondent are stepbrothers and cousins to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The appellant sought to evict the 1<sup>st</sup> respondent who was in occupation of a portion of the suit land. The 1<sup>st</sup> respondent filed a defence and counterclaim on the ground that the appellant had fraudulently caused the suit land to be registered in his name when the said land belonged to the respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents subsequently made an application to be enjoined in the suit, which was allowed. They subsequently filed a defence and counterclaim on the same grounds as the 1<sup>st</sup> respondent.



3. The appellant claimed that he was not required to have given any portion of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, as they ought to have gotten the land from their father, the Deceased. He further stated that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not live on the suit land, as they were married. He testified that he had another parcel of land in Mikumbene, which belonged to his father.
4. The 1<sup>st</sup> respondent's case was that he entered the suit land, which belonged to the Deceased, in 1963 and utilized about an acre thereof, where he planted trees. Further, that the appellant and his mother moved to the suit land in 1968 but their father sent his mother away. He further stated that he had beseeched the Deceased to help them, and that he (the Deceased) gave them a place to stay on the suit land.
5. His further testimony was that he learnt that the suit land was registered in the appellant's name in 1997. He prayed that his counterclaim be allowed and that he be awarded the land given to him by his uncle.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case was that the suit land belonged to their father, the Deceased. They corroborated the evidence of the 1<sup>st</sup> respondent and also stated that the Deceased had called a clan meeting and given the suit land to the respondents in the presence of the clan elders.
7. They further stated that the 1<sup>st</sup> respondent took possession of the suit land while the Deceased was still alive and that he had been cultivating the same. They further stated that they continued working on their respective portions of land but later stopped doing so due to family commitments.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further stated that the appellant's father chased him and his mother away from the suit land, but through the intervention of the 1<sup>st</sup> respondent; they were allowed to occupy a small portion of the suit land. However, when the Deceased became old and sick, the appellant, without their knowledge took him to the Lands Office and made him sign the transfer documents transferring the suit land to him (the appellant).
9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further stated that the appellant did not attend the Deceased's burial. That at some point, when the 3<sup>rd</sup> respondent went to work on her portion of the suit land, the appellant threatened her with dire consequences claiming that he was the registered owner of the suit land. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further claimed that the suit land belonged to them and that the 1<sup>st</sup> respondent was holding it in trust for them.
10. According to Gilbert Kimathi (DW3), the 1<sup>st</sup> respondent took care of the Deceased until his death while the appellant was in Nairobi. He further stated that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents used to cultivate the suit land, the same having been given to them by the Deceased while the 1<sup>st</sup> respondent was in occupation and possession of one acre of the suit land.
11. Mwanja M'Muguongo (DW4) told the court that sometime in 1974, the appellant hired his motor vehicle to transport the Deceased to the Lands Office in Meru. That they found the Deceased asleep and he appeared to be sick. It was his further evidence that he then drove the appellant and the Deceased to the Lands Office and then to the Land Control Board at Nkubu.
12. Stephen Meme M'Iringo (DW5) was a member of the Kiiru clan to which the appellant and the 1<sup>st</sup> respondent belonged. He testified that the Deceased had divided the suit land amongst his two daughters and the 1<sup>st</sup> respondent. According to his testimony, the appellant had fraudulently transferred the Deceased's land to himself.
13. Having carefully considered the evidence before it, the ELC noted that the court record was in shambles and that some of the hand written records and recorded typed statement of witnesses were



torn. The ELC indicated that it brought to the attention of counsel that the record was in disarray but both counsel opted to have the matter proceed despite the hitch. The ELC further observed that from the record, the appellant became the registered owner of the suit land on 2<sup>nd</sup> January 1975 after the Deceased transferred the land to him. However, the ELC noted that no other evidence other than the appellant stating that his uncle (the Deceased) transferred the suit land to him, was tendered to support this claim. Further, that the appellant had conceded that no one, including his family members, was involved in the transfer process.

14. The ELC held that the conduct of the appellant depicted him as a dishonest person and someone who could not be believed. While considering the circumstances surrounding the transfer, the ELC noted that the appellant had presented himself as the son of the Deceased and also used the name M'Ikiara throughout, including in court proceedings.
15. The issue of name was evidenced by the tribunal case LDT No. 99 of 2001 where it was ruled that the appellant had fraudulently changed his name from Kiruki M'Mwarania to Zacharia Kiruki M'Ikiara to get the suit land easily. The ELC further noted that the appellant had also tried to pass on the name of M'Ikiara as his father during the proceedings but when pressed further he had admitted that the Deceased was his uncle. The ELC held that the appellant was passing himself as the son of the Deceased solely to get the suit land. The ELC further held that the appellant had conducted the transfer in secrecy and that he had taken advantage of an old and sickly man.
16. The ELC took judicial notice of the importance of burying someone in African customary systems in holding that the failure by the appellant to attend the Deceased's burial did not pass the test of respect for interring a beloved or the appellant's allegation that he was close to the Deceased who had allegedly gifted him the suit land. Consequently, the ELC held that the transfer of the suit land to the appellant was through misrepresentation.
17. The ELC dismissed the appellant's suit and entered judgment in favour of the respondents and held in part as follows:

“Taking into totality all the circumstances of this case and while invoking the doctrines of equity and fairness, I am satisfied that the defendants have proved their case against the plaintiff on a balance of probability, that the 1<sup>st</sup> defendant is entitled to 1 acre of the suit property and that further the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are entitled to a transfer of the balance after deducting 1 acre for the 1<sup>st</sup> defendant.”
18. The ELC issued an order for the cancellation of the title to the suit land in the name of the appellant. That thereafter, one acre be registered in the name of the 1<sup>st</sup> respondent and the balance thereof be registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The Deputy Registrar was authorized to sign all requisite documents to facilitate the transfers. Costs were awarded to the respondents.
19. Being dissatisfied with the judgment, the appellant lodged the instant appeal in which he raised the following grounds of appeal, to wit:
  - a. The learned Judge erred in failing to appreciate the inadequacy of the recorded evidence adduced by the appellant;
  - b. The learned Judge erred in failing to adequately interrogate the claim of fraud which was not proved;
  - c. The learned Judge erred in failing to order a recall of parties whose recorded evidence was missing in the file;



- d. The learned Judge erred in failing to give weight to the fact that the appellant lived, worked, and possessed the suit land for over 50 years; and that
- e. The learned Judge erred in deciding on the issues not raised in the pleadings.

### **Submissions by Counsel.**

- 20. When the appeal came up for hearing, Mr. Ashford Riungu represented the appellant while Mr. Karanja represented the respondents. Counsel both relied on their respective written submissions.
- 21. Mr. Riungu submitted that when the court found out that some of the handwritten records were missing, it should have recalled the witnesses to give fresh evidence. He urged this Court to find that the absence of complete proceedings called for a retrial.
- 22. Opposing the appeal, Mr. Karanja submitted that the learned Judge noted that the record was in shambles but the parties had opted to have the case proceed from where it had stopped. Counsel pointed out that the matter had proceeded with the consent of the parties and therefore, the appellant could not be seen to steal a match by seeking a mistrial. Counsel relied on the case of *Cheruiyot v Korir* [2021] KECA 222 KLR in support of this submission.
- 23. Counsel further submitted that there was no cogent reason for this Court to depart from the findings of the trial court. Counsel urged this Court to dismiss the appeal with costs.

### **Determination.**

- 24. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules, 2022 provides that:
  - “On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
  - (a) to re-appraise the evidence and to draw inferences of fact; and...”
- 25. It follows that the primary role of this Court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the ELC and draw its inferences of fact. However, in doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses and we give allowance for the same. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 O’Connor P. stated thus:
  - “An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand”.
- 26. We have carefully considered the appeal, the submissions by counsel, the authorities cited and the law. We discern the issues for determination to be whether this matter should be referred to a retrial and whether the appellant was entitled to the suit land by virtue of being the registered owner thereof.
- 27. It is common ground that despite raising six grounds of appeal, the appellant only submitted on the issue of some of the missing handwritten proceedings and prayed that the matter be remitted back to the trial court for retrial.
- 28. It is common ground that some of the handwritten proceedings before the trial court were missing. It is also common ground that this issue was brought to the attention of the parties herein by the ELC. However, from the record, the parties herein agreed to proceed with the matter despite the missing proceedings.



29. That being the case, the ELC analyzed the evidence on record, which included the appellant's pleadings and witness statement, and thereafter rendered her decision in this matter. From the record, at no given point have we seen that the appellant objected to how the matter proceeded.
30. In the circumstances, we find that the appellant's attempt to seek a retrial before this Court amounts to an abuse of the court process as the issue is being raised for the first time on appeal without leave of the court and on the further ground that the appellant had acquiesced to the ELC proceeding with the case and determining it on the basis of less than perfect record of proceedings.
31. On whether the appellant was properly registered as the proprietor of the suit land, Section 26(1) of the *Land Registration Act* provides that:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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.”
32. It is common ground that the appellant herein is the registered owner of the suit land. The question that then begs to be answered is whether the appellant properly acquired the title to the suit land?
33. The ELC held that the said title had been acquired through misrepresentation as the appellant had represented himself as the son of the Deceased during the process of transfer. In fact, the deceased was his uncle. Further, that he had also taken advantage of the Deceased's old age and sickly state to have him sign the documents of transfer
34. The appellant's act of misrepresentation also occurred before the trial court when the appellant had attempted to pass out as the son of the Deceased. From the record, he had gone to the extent of changing his name to include that of the Deceased as his surname. The tribunal that heard the matter against him had found that he had fraudulently changed his name to make it easier for him to acquire the suit land under the pretence or guise that he was the son of the deceased.
35. Despite being the registered proprietor of the suit land, the appellant was not able to tell the ELC the due process that he followed when obtaining the said title. He merely stated that the Deceased had transferred the suit land to him. No documentary evidence was tendered before the ELC in support of this claim either.
36. The appellant also failed to give a satisfactory explanation as to why he had conducted the transfer in secrecy without the knowledge of the respondents who were the Deceased's immediate family members. That they only became aware that the suit land was registered in the appellant's name in 1997 despite the appellant having acquired the title in 1975.
37. Evidence was also led before the ELC to indicate that the appellant and the Deceased did not have a close relationship. At some point, when the appellant and his mother came home, they were chased away and it took the intervention of the 1<sup>st</sup> respondent for the Deceased to allow them to stay on a



portion of the suit land on humanitarian grounds. From the record, it is noted that soon thereafter, the appellant went to live in Nairobi and it was the 1<sup>st</sup> respondent who took care of the Deceased until his demise.

38. We also note that despite claiming to have been close to the Deceased and that the Deceased had gifted him the suit land by transferring it to him, the appellant did not attend the Deceased's funeral. From the record, he even started bullying the respondents after the Deceased's demise..

39. We have wondered why the deceased, knowing fully well that he had transferred to suit land to the appellant, proceeded to call clan elders and in their presence hand over the suit land to the respondents. The only reasonable answer we arrive at is that the Deceased did not know purport and import of the documents that he was signing when he was taken to the Land Registry in Meru and the Land Control Board at Nkubu.

40. The appellant contended that although the respondents had pleaded fraud, they had not proved the same. Black's Law Dictionary, 9th Edition, page 131 defines fraud as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

41. In the case of *Wambui v Mwangi & 3 others* [2021] KECA 144 (KLR), this Court pronounced itself as follows:

“Further, the decision in the case of *Railal Gordhanbhai Patel vs. Lalji Makanji* [1957] E. A 314 on the threshold for proof of fraud and applying the above threshold to the record ruled that, in the Judge's opinion, the evidence tendered on record had demonstrated clearly that the 2<sup>nd</sup> respondent fraudulently filed the High Court proceedings with the sole aim of defrauding the 1<sup>st</sup> respondent of the suit property, by presenting himself as Julius Mutug Muchemi holder of ID card No. xxxx.”

42. In this instance, the appellant presented himself before the Land Registrar and the Land Control Board as the son of the Deceased by changing his name, with the sole purpose of being registered as the proprietor of the suit land. This was done without the express knowledge of the Deceased and his family members as well as the officials concerned.

43. Section 80(1) of the *Land Registration Act* provides that:

“The court may order the rectification of the register by directing that any registration be canceled or amended if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake.”

44. In the result, we find that the entry denoting the transfer of the suit land to the appellant was through misrepresentation. We uphold the judgment of the ELC and find that, the title held by the appellant is invalid; the 1<sup>st</sup> respondent is the lawful owner of one acre of the suit land while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the lawful owners of the remaining parcel of the suit land. We order the Land Registrar Meru, to revoke, cancel or annul any title held by the appellant regarding the suit land.

45. For the above reasons, the appeal is without merit and is dismissed with costs to the respondents.

46. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF APRIL, 2025.**



**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

Signed

**DEPUTY REGISTRAR**

