



REPUBLIC OF KENYA



**M'Rukunga v Ngiri & 2 others (Civil Appeal 119 of 2019)
[2024] KECA 291 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 291 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 119 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
MARCH 8, 2024**

BETWEEN

THOMAS GITONGA M'RUKUNGA APPELLANT

AND

STEPHEN NGIRI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

LAND ADJUDICATION OFFICER IGEMBE DISTRICT 3RD RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Meru (M. Kasango, J.) dated 29th October 2010 and (J. Lesiit, J.) dated 18th November 2010 in HCCC No. 68 of 1992)

JUDGMENT

1. Our duty as the first appellate Court is to subject all the evidence that was tendered before the High Court to a fresh and exhaustive scrutiny and consideration and to reach our own conclusions thereon, while remembering that the High Court had the benefit of seeing and hearing the witnesses that testified before it. We do not have that advantage. (see *Selle & Another Associated Motor Boat Company Ltd & Others* [1968] EA 123).
2. The record shows that the appellant, Thomas Gitonga M'Rukunga, sued the respondents, Stephen Ngiri (1st respondent), Land Adjudication Officer Igembe District (2nd respondent) and the Attorney General (3rd respondent) in the High Court at Meru seeking the following orders:-
 - a. an injunction against the 1st respondent stopping him from developing and/or interfering with his (applicant's) land parcel No. Maua/Amwathi/3136 ("the suit property") and the enjoyment of the same;



- b. a declaration that he was the sole and rightful owner of all that portion of land originally registered as parcel 3126 Amwathi Adjudication Section;
 - c. a declaration that the 1st and 2nd respondents had colluded to take his points from the suit property; and
 - d. a declaration that the 10 points had been given to the 1st respondent and included in the 1st respondent's parcel number 5368.
3. The appellant's case was that sometime between 1979 and 1980 he bought the suit property measuring 0.26 acres from one M'Itirithia M'Ithirimba's Maua/Amwathi/1161. Subsequently, he pleaded, the 1st and 2nd respondents manipulated the land adjudication register by hiving off 0.10 acres from the suit property which they apportioned to the 1st respondent and given a number Parcel No. 5368. This had left the appellant with 16 points. It was further pleaded that the 2nd respondent had allocated him 10 points comprised in Parcel No. 5428 at another place but that the portion had not been located on the ground.
 4. The suit was opposed by the respondents. The 1st respondent denied all the allegations of conspiracy to manipulate the land adjudication register. The 2nd and 3rd respondents admitted that the appellant owned the suit property, but denied that it was 0.26 acres. They said that it was 0.16 acres.
 5. This is the suit that was heard by the High Court (M. Kasango, J.) and dismissed with costs on the basis that the appellant had failed to adduce evidence to prove the claim that 0.10 of an acre had been hived from the suit property.
 6. These are the findings that aggrieved the appellant and which led him to appeal to this Court. In his Memorandum of Appeal, the following were the grounds:-
 - “ 1) That the learned judge erred in fact and law by failing to consider the entire evidence on record regarding the actual measurement of the subject matter.
 2. That the learned judge erred in law and in fact to address the blatant violation of proprietary rights by the 2nd respondent without any or proper redress.
 3. That the learned judge erred in law and fact by failing to appreciate that the evidence tendered by the 1st respondent on how he acquired p/no 5368 was inconsistent with the provisions of the law applicable under the circumstances.
 4. That the learned judge erred in law and fact by failing to appreciate that a tenth of an acre could not be valued at Kshs. 100,000/= in 1987 within Maua/Amwathi adjudication section thereby failing to impeach the credibility of the 1st defendant's evidence.
 5. That the judgment was against the weight of evidence.”
 7. During the hearing of this appeal learned counsel Mr. Kaumbi appeared for the appellant. He had filed written submissions, and indicated he was fully relying on them. There was no attendance for the respondents, but learned counsel Mr. Ondieki had filed written submissions. The learned Attorney General acting for the 2nd and 3rd respondents had not filed written submissions. It was submitted on behalf of the appellant that his evidence and that of PW 2 (Japhet Kaburu Kagundu) and PW 3 (Jerusha Cimutu w/o M'Itirithi M'Ithirimba) had proved that the 2nd and 3rd respondents had interfered with the size of the suit property by hiving off 0.10 acres which they had given to the 1st respondent in parcel



No. 5368. We were asked to make a finding that the High Court had failed to address the violation of the appellant's right to property despite there having been several complaints addressed to the 2nd respondent by the appellant. Learned counsel addressed us on what he termed to be inconsistencies in the evidence of the 1st respondent regarding how he had acquired Plot No. 5368, and that, in contrast, he asked us to find that PW 2's evidence had proved that the suit property was originally 0.26 acres, and that 0.10 acres of it had been apportioned to the 1st respondent's parcel No. 5368.

8. In the submissions on behalf of the 1st respondent, the learned Judge had fully considered the evidence and had correctly come to the conclusion that the appellant had not proved his case on the balance of probabilities; that, therefore, the suit had properly been dismissed. Learned counsel Mr. Ondieki submitted that the appellant's claims of impunity, conspiracy and corruption were quite serious and yet:-

“The adjudication officer was a witness in court and none of the allegations of impunity and corruption were raised against him when he was in court ... during cross-examination nor in examination in chief ...”

Learned counsel submitted that the suit property and parcel No. 5368 were distinct parcels of land, each with its own origin and bought from different persons.

9. We have anxiously considered the evidence as recorded before the High Court, the impugned judgment and the rival submissions.
10. Under sections 107(1) and 109 of the *Evidence Act* (Cap 80), the appellant desired that the High Court gives him a judgment regarding the claims he had made against the respondents. He had the burden to prove those claims to be able to get a judgment in his favour (see *Adhiambo Okayo v Kenya Women's Finance Trust* [2016]eKLR and *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013]eKLR). The appellant had alleged that the respondents had conspired and taken away his 0.10 acres contained in parcel No. 1161 which they had transferred to the 1st respondent as parcel No. 5368. He was under the duty to prove the allegation as a way of discharging his burden. The standard of proof was on the balance of probabilities. The trial court had to consider the evidence called by the appellant and his witnesses and the evidence called by the respondents, and to determine whether the standard had been met by the appellant.
11. In deciding this appeal, we consider that the pleading contained in the plaint and the appellant's testimony essentially alleged fraud against the 1st and 2nd respondents. This is because of the use of the terms such as conspiracy, impunity and corruption. The particulars of this fraud were not indicated in the plaint. They were not particularized. It is well established that fraud must be specifically pleaded and particulars of the fraud alleged must be stated on the face of the pleadings; such acts of fraud must be set out, and distinctly proved (*Kuria Kiarie & 2 Others v Sammy Magera* [2018]eKLR).
12. We did not find in the plaint any acts of fraud that had been particularized. It is with this in mind that we note that when PW 2, the alleged perpetrator of the hiving off of the appellant's 0.10 acres, testified, the incidents of the alleged perpetration or conspiracy were not put to him. Better still, he was a witness called by the appellant. He was the Land Demarcation Officer based at Amwathi/Maua Adjudication Section. His evidence was that the 1st respondent's Parcel No. 5368 and the appellant's parcel 3136 were different and distinct, and were in different locations on the ground. That evidence appeared to agree with that of the 1st respondent who stated that he had bought his parcel No. 5368 from one Silas Ringine Imanene. It was the evidence of the appellant that he had bought 0.26 acres from M'Itirithia M'Ithirimba whose land was Parcel No. 1161 before 0.10 acres of it was hived off and given to the 1st respondent as Parcel No. 5368. According to the evidence of PW 2, the 1st respondent's parcel No.



5368 had originated from Parcel No.5366. He admitted that 0.10 acres had been hived from Parcel No. 3136 to make Parcel No. 5428 at another place. He concluded that the appellant had his own land and the 1st respondent had his own land, and that the two parcels were distinct on the ground. When he told the learned Judge that the 1st respondent's land did not originate from the appellant's land, and the two parcels were separate and distinct, the learned Judge could only reach one conclusion; that the appellant had not proved his case on the balance of probabilities.

13. We accordingly find no merit in the appeal, which we dismiss with costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024

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

