



REPUBLIC OF KENYA



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**Wandiga v Patel & 2 others (Civil Appeal 175 of 2019)  
[2024] KECA 1111 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1111 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 175 OF 2019  
HA OMONDI, JM NGUGI & HM OKWENGU, JJA  
AUGUST 30, 2024**

**BETWEEN**

**MILLICENT PERPETURE ATIENO WANDIGA ..... APPELLANT**

**AND**

**MAYBEN SURESHBHAI PATEL ..... 1<sup>ST</sup> RESPONDENT**

**VINIT SURESHBHAI PATEL ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR KISUMU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court  
at Kisumu (Kibunja, J.) dated 3rd July 2019 in Case No. 131 of 2012)*

**JUDGMENT**

1. The appellant, Millicent Perpeture Atieno Wandiga, sued Vinit Sureshbhai Patel, Mayben Sureshbhai Patel, and the District Land Registrar Kisumu, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively, claiming that she was the owner of the suit property, Kisumu Municipality/Block/10/78 following the allotment by the Commissioner of Lands in 1978; and that she obtained lease thereto in 1981. She further claimed that, in the year 1990, the appellant's neighbour, one Saeed Rauf Samnakay, encroached into her land and that she filed a suit which is still pending to date.
2. She claimed that she got to learn that the property had changed hands to the 1<sup>st</sup> and 2<sup>nd</sup> respondents when she saw a new development come up on the suit property, without her knowledge., She alleged that the title changes had been done fraudulent.
3. She, thus, sought orders for:
  - i. A declaration that the transfers in favor of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were procured by fraud.



- ii. An order that the title deed issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents be recalled, cancelled and revoked on the basis that it was procured by fraud.
  - iii. That the land register be rectified to read Millicent Perpeture Atieno Wandiga as the rightful owner of land parcel number Kisumu/Municipality/Block 10/78.
  - iv. That the house constructed illegally on land parcel number Kisumu/Municipality/Block/10/78 be demolished and an order of eviction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - v. General, exemplary, and punitive damages for fraud and trespass.
4. The appellant's contention was that the respondents committed fraud by transferring the suit land from her name without involving her; yet she still has title documents issued to her in 1981.
  5. The testimony that the appellant presented in court was that the suit property was allotted to her in June 1978, and she was eventually issued with a Certificate of Lease on 1<sup>st</sup> July 1978; she used to rent out the land, and had deposited some fencing posts and building materials thereon; later on, a boundary dispute arose between her and her neighbour, Samnakay Rauf and she took him to court in 1990 in Kisumu Civil Case No. 103 of 1990. However, the case was never finalized. Later in the year 2021, as she was paying the land rates, she noticed that the receipt was issued in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and realized that the property had been transferred to them.
  6. The appellant confirmed that she had obtained a loan of Kshs. 200,000/- from Barclays Bank using the title of the land as security; and denied entering into any sale agreement with Jagdip Morporia.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the appellants claim on the ground that they were bona fide purchasers for value without notice, for purposes of sale of a property situated within Milimani Estate and known as Kisumu Municipality/Block/10/78, having entered into an agreement on 4<sup>th</sup> April 2011, with the then owner of the land, Zainul S. Velji and Jagdip Bhagwandas Morporia for Kshs.10 million without noticing any defect on title. Apparently the said vendors had bought the property from the appellant, who was selling it to settle a bank loan. The 2<sup>nd</sup> respondent paid the purchase price and had the property transferred into her name and that of the 1<sup>st</sup> respondent.
  8. She explained that prior to the agreement being executed she carried out a search and confirmed the said vendors as the registered owners. She thereafter paid all the sum expected including stamp duty of Kshs.400,000/-, registration fees and search fees all totaling Kshs.3,500/- and legal fees of Kshs.200,000/-. Due to the improvement on the land and the general appreciation, the 2<sup>nd</sup> respondent honestly believed that the current market price of the property was in excess Kshs.35,000,000/-; and denied tampering with the records; also pointing out that the construction on the suit land commenced in 2010 and was done openly for two years without the appellant lodging any complaint.
  9. The 2<sup>nd</sup> respondent further testified that following execution of the sale agreement, and after all necessary due diligence had been undertaken, and the requisite levies and taxes paid, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were registered as joint proprietors of the residue of the leasehold interest in the suit property on 11<sup>th</sup> May 2011 and a certificate of lease issued. The 1<sup>st</sup> and 2<sup>nd</sup> respondents took possession of the property, had their development plans approved and commenced construction with no objections. They enjoyed quiet possession until the appellant emerged with a claim to the property in August 2012 or thereabouts, without complaining against the persons from whom the 1<sup>st</sup> and 2<sup>nd</sup> respondents had bought the property and who she knew very well.



10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also filed a counter claim against the 3<sup>rd</sup> respondent, stating that they had relied on documents of title issued by the 3<sup>rd</sup> respondent as custodian of land records, that they had paid the registration and search fees and stamp duty in the honest belief that the documents were authentic. They further, urged that in the event of any impropriety in the process being found, then the 3<sup>rd</sup> respondent ought to compensate them for the purchase price, stamp duty, legal fees incidentals totaling to Kshs.10,620,000/-. In the counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought that judgement be entered in their favour for:
  - i. Kshs.10,620,000/= with interests thereon from 11<sup>th</sup> May 2011 to payment in full.
  - ii. General damages for fraud loss of bargain and loss of value of the property with interest thereon.
  - iii. Costs of the counterclaim.
11. The 3<sup>rd</sup> respondent denied the allegations of fraud; and prayed for the suit to be dismissed. This respondent did not file a defence to the counter claim by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
12. Zainul Velji, DW1, a business woman in Kisumu town, confirmed that, together with Jagdip, they acquired the undeveloped parcel from the appellant, who was introduced to them by one Barack, an estate agent. They got a copy of the title deed, carried out a search that showed the appellant was the owner. They then entered into a sale agreement dated 1<sup>st</sup> February 2010, for a consideration of Kshs.2,200,000/-, and among the documents the appellant availed were copies of her identity card and a copy of the PIN certificate. They paid the purchase price as agreed; and this was confirmed by an acknowledgment; the appellant also gave them documents to confirm payment of land rates and rents; as well as a rates clearance certificate. The appellant also obtained consent to transfer the plot and the purchasers finally registered the transfer after paying the requisite fee; and ultimately, they were issued with a certificate of lease dated 10<sup>th</sup> February, 2010. A year later they developed the property, with no objections either to the development or a challenge to their ownership.
13. Eventually when the purchasers wanted to dispose of the property, they sent word out; and that is how the 1<sup>st</sup> and 2<sup>nd</sup> respondents ended up buying the property from them at Kshs. 10,000,000/-.
14. Upon considering the evidence on record the trial court found that the evidence showed that the appellant was the first registered owner of the leasehold interest over the suit property for 99 years from 1<sup>st</sup> July 1978; that the allotment letter of 1<sup>st</sup> July 1978 allotted to the appellant the suit property; and on 31<sup>st</sup> August 1981 the lease was registered by the 3<sup>rd</sup> respondent.
15. The court also noted that the appellant had charged the title with Barclays Bank, for Kshs.200,000/= which was later on discharged; further that the certificate of title produced by the appellant did not have an entry about the certificate being issued on the proprietorship section or the charge being registered on the encumbrances section as is standard practice; thus leading to the question as to whether the certificate of lease produced was made from the original certificate of lease, when, as compared to the copy of certificate of lease produced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the details noted missing from the appellant's copy of lease.
16. The trial court agreed with the respondents' counsel that the appellant did not challenge evidence presented with regards to transaction over the suit land, as in fact the appellant was pointed out at the trial, as the person who sold and transferred the land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The court also found that the respondent did their due diligence when buying the suit property; and that they were purchasers for value without any notice of defect in title.



17. The court also pointed out that although the appellant pleaded fraud, she did not avail evidence to the particulars set out. The court held that the appellant's allegations that the signatures in the sale agreement were not hers was not in itself proof of fraud and that she ought to have called an expert witness to confirm that the signatures were not hers. Further, that the appellant did not tender any evidence to show how any of the respondents tampered with the suit land records; and there was no evidence that the appellant had ever applied for certificates or other documents over the suit property that were declined. Had that occurred, the appellant would have availed copies of the applications and payments made thereof, or a reply from the Land Registrar on the matter.

The learned judge thus stated:

“The totality of the evidence shows that the transaction between the plaintiff as the vendor, and Jagdip and DW1 as purchasers over the suit property, occurred. That transaction was not fraudulent, illegal or unprocedural. That as the said Jagdip and DW1 obtained good title, and have through the testimony of DW1 confirmed that they transferred their interest to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, then the later acquired the title to the suit property legally and procedurally, and therefore have good title free from fraud.”

Consequently, it was found that the appellant failed to prove her case on a balance of probabilities and the suit was dismissed with costs.

18. The appellant, aggrieved by the decision of the trial court, filed its memorandum of appeal dated 15<sup>th</sup> August 2019 listing 13 grounds of appeal some of which are repetitive, but can be condensed as follows:
1. The learned judge erred in law and in fact by: failing to appreciate and evaluate the evidence adduced before him by the appellant, particularly on the issue relating to fraud, and holding that the 1<sup>st</sup> and the 2<sup>nd</sup> respondents obtained a good title yet their predecessors in title had a clearly bad title; in relying on a witness statement whose makers were never called to testify in open court, thereby denying the appellant the right to cross examine; in holding that the defence evidence; in shifting the burden of proving the signatures to the appellant herein; relying on a photograph that did not at all resemble the appellant herein, and in relying on the evidence adduced by DW2 who did not have a valid power of attorney.

The appellant thus prays that the appeal herein be allowed and the judgment delivered on the 3<sup>rd</sup> day of July 2019 be set aside and judgement be entered as prayed in the plaint in the High Court and the costs be in her favour.

19. In her written submission, the appellant argues that she proved her case to the required standard; and maintains that the respondents engaged in fraud to transfer the suit property from herself to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The appellant also submits on the issue of the sale agreement between her and the 1<sup>st</sup> and the 2<sup>nd</sup> respondents, that the same was an afterthought, crafted to fit into the transfer process in favor of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, owing to the fact that said agreement did not indicate who drew it nor was it dated.
20. The appellant argues that the trial court erred in relying on the witness statement of one Barack Ogindo, who was not called to testify by the 1<sup>st</sup> and 2<sup>nd</sup> respondents nor did the appellant have a chance to cross examine him.
21. On the issue of fraud, the appellant contends that the signature in the alleged sale agreement, as well as the signature on the acknowledgment receipts were not hers, as there was a lot of variances; and the signature in the sale agreement was not the same one as in the transfer form and in the letter of



allotment in 1980. Based on the variance of the signatures, the appellant submits that the trial court was in error to conclude that an expert witness ought to have been engaged by the appellant to prove the veracity or lack thereof of the signatures complained of.

22. On the issue of power of attorney issued to DW2, the appellant argues that the trial court erred in relying on her testimony, as the said Power of Attorney was not notarized in Malaysia, and as such DW2 had no valid Power of Attorney.

**1<sup>st</sup> and 2<sup>nd</sup> Respondent’s submissions.**

23. On the issue of the filed witness statement of Barck Ogindo, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the court did not rely on the said witness statement as the conclusion of the court was based on DW1 & 2’s evidence and demeanor.
24. As to whether the appellant proved her case to the required standard, the respondents answer that in the negative, maintaining that the appellant was given every chance to challenge the respondents evidence but did not.
25. On the issue of fraud, the respondents submit that although the particulars of fraud were set out in the plaint, none of these grounds were proved.
26. In relation to the issue of the Power of Attorney, the respondents submit that the same was produced without objection and that it was duly registered as required by law and was thus valid; that the appellant was unable to produce any evidence of payment of rates, which according to the respondents meant that she had no proof of the same as she had already transferred the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
27. This being a first appeal and has been reiterated in several decisions of this Court, it is this Court’s primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.
28. The main issue to be determined by this Court is whether or not the 1<sup>st</sup> and 2<sup>nd</sup> respondents acquisition of the suit property was fraudulent. The *Land Registration Act* is very clear on the issues of ownership of land. Sections 24(a), 25(1) and 26(1) are instructive. The law is clear that 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 is the absolute and indefeasible owner and shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person named is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.
29. This Court in *Munyu Maina vs. Hiram Gathiba Maina, Civil Appeal No. 239 of 2009*, held;
- “we have stated 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. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted in the register.”
30. It is not in dispute that the appellant was the first registered owner of the suit property and the lease thereto issued on 31<sup>st</sup> August 1981. It is also not in dispute that the appellant charged the property with Barclays Bank of Kenya for Kshs.200,000/- which was later discharged. However, it is this charging of the suit property to the bank that brings into question whether the copy of the certificate of lease



produced by the appellant was made from the original certificate of lease, thus bringing into question the ownership of the property.

31. This Court agrees with the observation of the trial judge that the certificate of lease ought to have under the 'Proprietorship Section' an entry of when the certificate was issued or the charge being registered, and further on the 'Encumbrances Section' ought to have details of the charge and discharge of charge. However, the certificate of lease as produced by the appellant did not have these details, and oddly enough, the copy as produced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents had the details on both sections correctly filled in, so logically the rational inference to draw is that the copy produced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was, indeed, made from the original certificate of lease to the suit property, which clearly shows the facility was taken by the appellant on 3<sup>rd</sup> June 1992, discharged on 22<sup>nd</sup> April 2003 and the re-issue of certificate of lease to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' on 25<sup>th</sup> August 2003.
32. The appellant, in her evidence, claims that she was not involved in the transaction leading to the transfer of the suit property from her name. However, the same evidence shows that the appellant did not even try to challenge the evidence presented by the respondents on how the 1<sup>st</sup> and 2<sup>nd</sup> respondents obtained the copies of the certificate of lease, the appellant's identity card and PIN. In fact, one of the witnesses, DWI Zainul S. Velji managed to point out the appellant in court as the person who sold and transferred the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
33. The appellant also claims that the respondents, through fraud, managed to transfer the suit property from her name to that of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and even goes ahead to list the particulars of fraud. This Court, in the case of *Demutilla Nanyama Pururmu vs. Salim Mohamed Salim* [2021] eKLR, quoting *Vijay Morjaria vs. Nansingh Maddhusing Darbar & Another* [2000] eKLR, Tunoi JA, as he then was, stated:

“it is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctively proved and it is not allowable to leave fraud to be inferred from the facts.”
34. As regards the standard of proof, this Court has, in the case of *Kinyanjui Kamau vs. George Kamau* [2015] eKLR, stated that it is trite law that any allegations of fraud must be pleaded and strictly proved. In *Ndolo vs. Ndolo* (008) I KLR (G&F) 742 the court stated that:

“...since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
35. The appellant cannot, therefore, be heard saying that “it was obvious” that the signatures were clearly different and as such there was no need to call in an expert witness to confirm the same.
36. The Court of Appeal in Uganda, in *Katende vs. Haridar & Company Limited* [2008] 2 E.A. 173 as quoted by the Court of Appeal in *Nakuru CoA App No. 291 of 2013* *Weston Gitonga & 10 Others vs. Peter Rugu Gikanga & Another* [2017] eKLR, held:

“for the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

  - i. He holds a certificate of title.



- ii. He purchased the property in good faith.
- iii. He had no knowledge of fraud.
- iv. He purchased for valuable consideration.
- v. The vendors had apparent valid title.
- vi. He purchased without notice of any fraud.
- vii. He was not party to any fraud.”

37. The evidence on record shows that the 1<sup>st</sup> and 2<sup>nd</sup> respondents bought the suit land from Zanul S. Velji & Jagdip Bhagwandas Morporia. This Court also notes that Zanul S. Velji, testified for the respondents’ as DW1, and as the trial court rightly put it the evidence of DW1 was emphatic and first hand as DW1 was involved in the sale and there was no reason advanced as to why he would lie.
38. We take note, and concur with the trial court that the 1<sup>st</sup> and 2<sup>nd</sup> respondents carried out due diligence when buying the suit property; and had there been any defect the 3<sup>rd</sup> respondent would not have issued title. It will be noted that the 3<sup>rd</sup> respondent’s defence only disputed the appellant’s claim, but said nothing on the lack of legitimacy of the title issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. There is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into the sale agreement with bad faith, or that they did not follow due process.
39. From the evidence on record this Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were bona fide purchasers for value, meaning that the 1<sup>st</sup> and 2<sup>nd</sup> respondents title is absolute and indefeasible; and said title should be shielded from being defeated as provided by section 25 of the [Land Registration Act](#).
40. The end result, therefore, is that we find and hold that the appellant’s appeal lacks merit; as such there is no reason to disturb the judgment of the trial court. The same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF AUGUST, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

