



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wamunyu v Njoroge (Civil Appeal 69 of 2018)
[2023] KECA 1441 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1441 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 69 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
NOVEMBER 24, 2023**

BETWEEN

ELIAS JOSEPH WABURI WAMUNYU APPELLANT

AND

JOSEPH MWANGI NJOROGE RESPONDENT

*(Being an appeal from the Judgment/Decree of the ELC Court at Nakuru
(Sila J) dated 20th September 2017 In Nakuru ELC Case No. 186 OF 2013)*

A party claiming ownership of land but had not discharged burden of proof concerning the validity of his title documents could be deemed to have obtained the title documents fraudulently.

This appeal arose from a land dispute concerning the subdivision of Nyandarua/Mawingo/90, originally owned by Simon Njoroge Munywe. The appellant, Elias Joseph Waburi Wamunyu, claimed ownership of Nyandarua/Mawingo/764 (20 acres), while the respondent's father claimed Nyandarua/Mawingo/725 (4 acres). The Environment and Land Court (ELC) declared the subdivision creating the appellant's title fraudulent and upheld the respondent's title as valid. The appellant argued procedural and evidentiary errors, asserting his title predated the respondent's. The Court of Appeal upheld the ELC's decision, finding that the appellant failed to prove the authenticity of his documents and that the respondent's title was lawfully obtained. The appeal was dismissed with costs.

Reported by John Ribia

Law of Evidence – burden of proof – documentary evidence – land ownership documents – validity documentary evidence that had been presented as title/ownership – party whose title documents were not valid - whether a party that claimed ownership of land but had not discharged the burden of proof concerning the validity of his title documents could be deemed to have obtained the title documents fraudulently - Evidence Act (cap 80) sections 109 and 122.

Brief facts

The appellant filed an appeal against the judgment of the Environment and Land Court (ELC) at Nakuru, which had declared the subdivision of Nyandarua/Mawingo/90 into Nyandarua/Mawingo/761 and



Nyandarua/Mawingo/764 as fraudulent and nullified the appellant's title. The dispute arose from competing claims to portions of the land purchased from the original owner, Simon Njoroge Munywe. The appellant claimed to have purchased 20 acres in 1982, while the respondent's father purchased 4 acres in 1987. Both parties alleged rightful ownership and produced conflicting documentation, including titles and survey records.

The trial court found that the respondent's title to Nyandarua/Mawingo/725 was valid, while the appellant's title was fraudulent, and awarded costs against the appellant. Aggrieved, the appellant lodged the present appeal.

Issues

Whether a party that claimed ownership of land but had not discharged the burden of proof concerning the validity of his title documents could be deemed to have obtained the title documents fraudulently.

Held

1. Both the appellant and the respondent had at various times each bought portions of land to be excised from the same parcel. The appellant admitted that he bought the land in 1982 and that at the time, the land was still under the Settlement Fund Trustees and the loan owed to the Settlement Fund Trustees was not cleared. The appellant did not have payment receipts for the mutation or the issuance of the title deed and that he did not have a transfer in respect of the parcel he claimed he owned. He did not have the consent of the Land Control Board either. The omissions casted doubt on how the appellant acquired title to the suit land.
2. In light of the glaring inconsistencies in the appellant's evidence and the documents that he produced in support of his claim, the trial court could not be faulted for concluding that it was the appellant who obtained title to the property fraudulently and that the respondent had obtained title to the adjacent property genuinely.
3. He who asserted the existence of certain facts had to prove them. All the documents that were relied upon by the appellant as proof that he had acquired a genuine title to land were full of glaring inconsistencies and there was no plausible explanation from the appellant. It was incumbent upon him to explain the glaring inconsistencies and he did not.
4. Sections 109 and 122 of the Evidence Act placed the burden of proof on the appellant. The process through which the appellant acquired title to the impugned property was marred with irregularities within his knowledge and the only logical inference that could be made was that the documentation that he relied on were either fraudulent or forged.

Appeal dismissed.

Orders

Costs to the respondent.

Citations

Cases

Kenya

1. *Odera, Abok James t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (Civil Appeal 161 of 1999; [2013] KECA 208 (KLR)) — (Explained)
2. *Kamau, Jennifer Nyambura v Humphrey Mbaka Nandi* (Civil Appeal 342 of 2010; [2013] KECA 423 (KLR)) — Explained

Statutes

Kenya

Evidence Act (cap 80) sections 109, 122 —(Interpreted)

Advocates

None mentioned



JUDGMENT

1. Elias Joseph Waburi Wamunyu (the appellant herein), has filed this appeal against the judgment of Sila J, dated September 20, 2017.
2. The appeal arises from a suit that had been filed at the Environment and Land Court in Nakuru sometimes in the year 2010 by the appellant against the respondent, in which the appellant had sought inter alia a declaration that he was the sole and absolute proprietor of Land Parcel No. Nyandarua/Mawingo/764 comprising of 20 acres being an excision from Nyandarua/Mawingo/90 having purchased it in 1982 from Simon Njoroge Munywe (the vendor). He averred that he obtained the consent of the Land Control Board for the subdivision and eventual transfer into his name. His complaint was that the respondent (the then defendant) had encroached on his 4 acres of land claiming to have also bought it from the vendor and had it registered as Nyandarua/Mawingo/725.
3. The respondent had on the other hand filed a defence and counterclaim dated 10th April 2010, seeking inter alia a declaration that he too was the sole and absolute proprietor of all that parcel of land known as Nyandarua/Mawingo/725 measuring four acres or thereabouts. He also sought a permanent injunction to restrain the appellant and or his servants from entering, occupying or interfering with the said land purporting it to be part and parcel of Nyandarua/Mawingo/764.
4. The matter was heard by Sila J, who in a judgment delivered on 20th September 2017, made a declaration that the purported subdivision of land parcel number Nyandarua/Mawingo/90 into land parcels Nyandarua/Mawingo/761 and 764 was fraudulent and null and void. In his findings, the learned judge found that the respondent was the proper and legitimate proprietor of land parcel number Nyandarua/Mawingo/725 measuring 4 acres or thereabouts and further condemned the appellant to pay the costs of the suit and the counterclaim.
5. The appellant was aggrieved by the aforesaid findings thus provoking the instant appeal vide a Notice of Appeal dated October 2, 2017 and a Memorandum of Appeal dated April 6, 2018, setting out a whooping 18 grounds of appeal which we shall advert to shortly.
6. Briefly, the appellants case was that he had negotiated for the purchase of 20 acres of land from Simon Njoroge Munywe (PW2), at an agreed purchase price of Kshs 100,000.00. It was his evidence that the 20 acres was from plot number Nyandarua/Mawingo/90 which was then 52 acres and that he obtained title deed for the 20 acres on March 13, 1994.
7. He further testified that the respondent trespassed onto his land in the year 1989 and lived as a tenant in a house within the portion of land that he had bought whereupon he tried to evict him. The respondent moved out of this house only to erect a new temporary structure where he now resides and in the year 2009, he erected a second structure. It was his further evidence that all these buildings were on his portion of land.
8. He further testified that his land parcel number 764 is 20 acres and the respondent had encroached on 4 acres of his land. He testified that he was aware that PW2 (the vendor) had sold other portions of land though he did not know if the respondent had purchased land from the vendor. He entered into an agreement with PW2 in the year 1986 though he got the title in 1994. It was his testimony that he filed suit against PW2 in Civil Suit No 633 of 1990 in Nairobi seeking orders to have him subdivide the land so that he could get his 20 acres and he succeeded in the case but there was a problem in getting the title, because of cautions lodged by the respondent which cautions were later removed by the Registrar.



9. PW2 was Samuel Karanja Munywe(the vendor). It was his evidence that he was allocated land parcel No Mawingo Plot 90 by the Settlement Fund Trustees. He took possession of the land in 1962. That, in the year 1982, he sold 20 acres of the land to the appellant at Kshs 100,000.00. In 1987, he sold 4 acres of the land to the respondent's father which portion was in the furthest area adjacent to plot No 91.
10. It was his testimony that later he sold the rest of the land to 6 other people and realized that the land was not big enough for all the buyers as although he had been given 62 acres by the Settlement Fund Trustees in actual fact, the land was 52 acres. He testified that both the appellant and the respondent had sued him seeking orders to transfer their respective pieces of land to them.
11. PW3 was Joshua Adel Nyabola, a Government Surveyor attached to Nyahururu Station. Pursuant to an order of the Court, he visited land parcels Nyandarua / Mawingo /725 and Nyandarua/ Mawingo/764 to ascertain whether they occupy the same ground.
12. He visited the suit property on February 1, 2017and discovered that parcels No. Nyandarua/ Mawingo/ No 725 comprising of 4 acres is within the 20 acres comprised in No.Nyandarua/ Mawingo/764.
13. PW4 was Nathan Gioche Gathaiya, a Land Registrar at Nyahururu.
He produced a Green Card in respect of land parcel No Nyandarua/Mawingo/90 which was opened on December 29, 1998in the name of the Settlement Fund Trustees. According to the Green Card, the area was approximately 21.0 Ha and on May 11, 1989, the Settlement Fund Trustees transferred the land to PW2 whereupon he was issued with a title deed on the same day.
14. It was his further evidence that entry No 8 dated March 31, 1994, showed that the title was closed on sub-division to create land parcel numbers 724 and 725 and that there was a crossing on these two parcels whereupon new numbers were inserted which are shown as parcels numbers 761 and 764.
15. He further testified that he did not have the Green Card for parcel numbers 724 and 725 as the Green Card showed that they were cancelled. He further testified that he had the title abstract for land parcel number 764 which was opened on March 31, 1994, in the name of Simon Njoroge and that on the same day, a transfer was done in favour of the appellant whereupon he was issued with a title deed.
16. As the respondent died during the pendency of the suit at the High Court, his son Alexander Njoroge Mwangi took over the case. He testified that on May 21, 1987, his deceased father had entered into a written sale agreement with PW2 to purchase 4 acres of land from land parcel number Nyandarua/ Mawingo/90 for Kshs 12,000.00 per acre.
17. It was his further evidence that the 4 acres was shown to his father and he put up a house on the land, but the vendor refused to transfer the land. When the vendor refused to transfer the land. his father filed Civil Case No 186 of 1993 in Nyahururu, whereupon steps were taken to enforce the decree by proceeding to do the subdivision and that a mutation was drawn excising the 4 acres.
18. He produced a copy of the mutation form which showed that sub division was done to produce land parcels number 724 and 725, which mutation was later presented to the lands office and produced receipts evidencing payment. He further produced an application for Land Control Board Consent dated November 17, 1993 signed by the Executive Officer; Nyahururu Resident Magistrate's Court, whereupon, a transfer was prepared and signed and copies presented to the lands office and a title was issued.
19. It was his evidence that his deceased father applied for a copy of the Green Card on May 24, 2006and that as of March 31, 1994, the title to land parcel No 90 was closed to create parcel No's 724 and 725



- and that they had been in occupation of the land from 1987 to date. He maintained that the 4 acres were well defined.
20. DW2 was Joshua Nyabola (who had also testified for the appellant). This witness was however stood down as it emerged that he did not have the authority to speak about the Registry Index Map for Mawingo Scheme as he was from Nyandarua and not from Nyeri Provincial Survey Office.
 21. DW3 was Nathan Gioche Gathaiya, a Land Registrar at Nyahururu.
(witness had also testified for the appellant). He produced extract of title in respect of land parcel No. Nyandarua/Mawingo/90.
 22. DW4 was John Kinyajui Ndururi, a Surveyor in the Firm of Arch Surveyors. He testified that the respondent had a Court order directing that he be granted 4 acres of land parcel No. Nyandarua/Mawingo/90 and that he had also obtained consent from the Land Control Board.
 23. It was his evidence that in pursuance of the said Court order, he proceeded to the ground accompanied by the area chief and the respondent and that he had a Registry Index Map which indicated the land parcel had not been sub-divided before and he proceeded to excise the 4 acres and placed pegs around the boundary. He then drew the mutation, signed the same and took it to Court to be signed by the Executive Officer. Subsequently, the District Surveyor gave the 4 acres a new Parcel No 725 whereas the remaining portion was given number 724.
 24. DW5 was Stephen Githaiga Muturi, a Surveyor working in the Nyeri Provincial Survey Office. He produced Registry Index Map for Mawingo Settlement Scheme which was amended on July 12, 2005 and according to the document, land parcel 90 was subdivided into parcels number 724 and 725. The same was issued on 13th July 2005 and was signed by one David Ngata then working in the Provincial Survey office. He recognized David Ngata's signature. He confirmed that the rubber stamp was authentic.
 25. When the appeal came up before us for hearing on March 7, 2023, Mr Litoro Oscar learned counsel appeared for the appellant whereas Mr Kamanga appeared for the respondent. Both parties sought to rely on their written submissions and digest of authorities dated February 20, 2023 and March 3, 2023 respectively, which they briefly orally highlighted in court.
 26. The appellant in his written submissions summarized the 18 grounds of appeal into 3 and submitted, inter alia, that the learned judge misdirected himself on the evidence and the law on the matters before him by finding that the proper subdivision of the land parcel Nyandarua/Mawingo/90 is the division of the land parcel Nyandarua/Mawingo/724 and 725 as it came first in time in spite of the contrary overwhelming evidence.
 27. It was further submitted that despite the evidence showing that the appellant acquired his parcel of land in 1982 while the respondent acquired his in 1987, the learned judge without any basis found that the respondent's title came first in time.
 28. The learned judge was further faulted for failing to observe that the proper sub-division of land parcel known as Nyandarua/Mawingo/90 is the subdivision of the said land into parcels No Nyandarua / Mawingo/761 and 764. It was submitted for the appellant that he had demonstrated that he had bought 20 acres of land parcel number 764 before the respondent bought his said 4 acres from PW2 and further that he had demonstrated how he obtained his title which was supported by documentation at all stages as compared to the respondent's title which was characterized by various irregularities which the learned Judge overlooked.



29. It was further submitted that the owner of the original title to the suit property had confirmed that he sold a total of 20 acres to the appellant, thus the vendor had confirmed the transaction.
30. Finally, the learned judge was faulted for finding that all documentations relating to the appellant's title to parcel No Nyandarua/Mawingo/764 were obtained through fraud. It was submitted for the appellant that he had been adjudged culpable of fraudulent activity in conjunction with personnel at the Land Registry without the fraud being distinctly alleged and or distinctly proved.
31. On the other hand, it was submitted for the respondent that although the appellant in his testimony claimed that in pursuing his title deed for the parcel of land, he sued the original owner in Nairobi SRMCC No 633 of 1990, and he obtained a decree; that the learned judge did analyse the appellant's documents as presented and correctly noted that there was no attempt at all to enforce the said decree, yet from the appellant's testimony he claimed that he obtained title deed by implementing the decree and in another breath, he stated that he obtained the title by having the entire requisite documents executed and signed by the original owner.
32. It was further submitted that the appellant did not produce the application for consent to subdivide parcel number Nyandarua/ Mawingo/90, transfer instrument for parcel of land number Nyandarua/ Mawingo/ 764 executed by both parties and receipts of payments for the opening of the new records/ Green Cards, title deed, consent, registration and the amended Registry Index Map and payment of stamp duty on transfer of the property.
33. It was submitted that whereas the appellant may have possibly bought his parcel of land before the respondent, the latter had clearly demonstrated that after falling out with the registered owner, he proceeded to file suit vide Nyahururu CMCC No 186 of 1993 wherein he obtained a decree which he subsequently implemented culminating in his acquisition of the title.
34. It was the respondent's further submission that the appellant had stated in his testimony that he had an application for Land Control Board Consent dated August 16, 1982, yet, at the time, the land was still under Settlement Fund Trustees, and that the purported letter of consent dated August 20, 1982 relates to Nyandarua / Mawingo / 90B, a non-existent title.
35. It was further submitted that the Land Registrar who testified as PW4 produced the original Green Card for parcel number Nyandarua/Mawingo/90. He stated that there was an entry subdividing parcel number 90 in the first instance which was cancelled but the said cancellation was not countersigned and neither was the date for the cancellation given. This witness confirmed that the last entries showed that title deed was closed to create subdivisions of parcels number 724 and 725 and that as such, it was clear from the evidence that as late as May 24, 2006, land parcel number Nyandarua/Mawingo/90 was on March 31, 1994 closed on sub division to create parcels numbers Nyandarua/Mawingo/724 and 725 and that even as late as May 24, 2006, land parcel number Nyandarua /Mawingo/764 was not reflected anywhere in the records held at the land registry or at the survey office.
36. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the Rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion. This duty was reiterated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where this Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and re-analyse the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”

37. Having carefully perused the record and the rival pleadings by the parties, we have framed the following 2 main broad issues emerge for our determination:
- i. Whether the learned judge erred and misdirected himself when he came to the conclusion that it was the appellant who obtained title to the property known as Nyandarua/Mawingo/764 fraudulently and that the respondent obtained a genuine title to his property known as Nyandarua/Mawingo/725?
 - ii. Whether learned judge erred in law and fact in finding that all documentations relating to the appellant’s title to parcel No Nyandarua/Mawingo/764 were obtained through fraud?
38. Turning to the first issue, it is indeed not in dispute that both the appellant and the respondent had at various times each bought portions of land to be excised from Nyandarua/Mawingo/90 from PW2. The appellant’s case was that he had negotiated to purchase 20 acres of land from PW2 which was to be excised from Plot No 90 which was 52 acres and that he obtained title in respect of parcel number 764 in 1994. It was his further evidence that the respondent had trespassed on the land in 1989 and that he was living as a tenant in a house within the portion of land that he had bought. It was his further evidence that his land was intact and had not been subdivided and that respondent had encroached on 4 acres thereon.
39. In cross examination, the appellant admitted that he bought the land in 1982 and that at the time, the land was still under the Settlement Fund Trustee as PW2 had not cleared the loan owed to the Settlement Fund Trustees. He further admitted that he did not have payment receipts for the mutation or the issuance of the title deed and that he did not have a transfer in respect of parcel number 764. He admitted that he did not have the consent of the Land Control Board for land parcel No 764.
40. In our view, these omissions cast doubt on how the appellant acquired title to land parcel number Nyandarua/ Mawingo/764.
41. The respondent’s case on the other hand was that on May 21, 1987his deceased father had entered into a land sale agreement with PW2 for sale of 4 acres from land parcel number Nyandarua/Mawingo/90 at the price of Kshs 12,000.00 per acre. The deceased paid the consideration in full. However, the vendor refused to transfer the land prompting his father to file Nyahururu Civil Case No 186 of 1993 which was determined in the respondent’s favour. The respondent’s deceased father proceeded to effect the subdivision and a mutation was done excising the 4 acres. The subdivision produced land parcel numbers 724 and 725 and that the said mutation was subsequently presented to the Land’s Office. An application for the Land Control Board Consent dated November 17, 1993was made, a transfer prepared and signed by the Executive Officer of the Resident Magistrate’s Court at Nyahururu and a title deed subsequently issued. The respondent gave a clear and vivid evidence of the steps that his deceased father took to have himself registered as the proprietor of land parcel number Nyandarua/ Mawingo 725 in pursuance of the decree issued in Nyahururu Civil Case No 186 of 1993. His evidence towards this respect was materially corroborated by the evidence of DW4 a surveyor from the firm of Arch Surveyors who in pursuance to the court order excised the 4 acres. It is also noteworthy to point out that the findings in Nyahururu Civil Case No 186 of 1993 have not been set aside.



42. The learned judge who had the opportunity of seeing the witnesses testify while analyzing the evidence stated at page 41-45 of his judgment as follows:

“The defendant quickly moved to execute this judgment through the Executive Officer of the court. He obtained the consent of the LCB on December 17, 1993. He also engaged a surveyor who drew a mutation form on 11 November 1993. The mutation form was signed by the Executive Officer on November 17, 1993 and paid for on the same day. The defendant did not produce the original payment receipts as exhibits to demonstrate this. It is however not clear whether this mutation form was ever registered, for what was produced did not have a Presentation Book number nor a date of registration. It is this mutation form which proposed to subdivide the land parcel No 90 into the land parcels No 724 and 725.

At this juncture, it will be observed that there were two mutation forms, one drawn by the plaintiff proposing to subdivide the land parcel No 90 into land parcels No. 761 and 764, the latter to be the plaintiff's 20 acres, and the other mutation form drawn by the defendant proposing to subdivide land parcel No 90 into land parcels No. 724 and 725, the latter being his 4-acre share.

What happened after that is in serious contention. According to the plaintiff, his mutation form was registered on 31 March 1994 and he was immediately issued with a title deed to the parcel No 764 on the same day. His title deed however reads that it was issued on March 30, 1994 which is the day before. According to the defendant, the land parcel No. 90 was subdivided following his version of the mutation form, and titles No 724 and 725 ensued. His case is that he was also issued with a title deed on March 31, 1994. These two scenarios cannot co-exist, and it is my impression that one party may have backdated their title deed to match what was in the register. But who? The answer to this question should reveal itself from the abstract of the title, or the Green Card to parcel No. 90, but again, we have two different Green Cards and we have to work out which between the two, appears, on a balance of probabilities to be the authentic one.

None of the parties produced a green card prepared in the 1990s. The earliest Green Card is the certified copy produced by the defendant which was extracted on 24th May 2006 and signed by Mr CO Birundu, the then land Registrar. Entry No 8 is dated 31 March 1994, and it shows that the title to the land parcel No. 90 was closed on subdivision to produce the land parcels No. 724 and 725. The plaintiff however had a green card which crosses out the subdivision creating the parcels No 724 and 725, and in place thereof, inserts the land parcels No 761, 762, 763, 764 and 765 as being the subdivisions of the land parcel No. 90. This cancellation was never countersigned and no date entered to show when the cancellation was done. If indeed what was entered on 31st March 1994, were the parcels No 761 to 765, as noted in the Green Card produced by the plaintiff, the defendant's Green Card extracted in the year 2006, could have reflected this. But, what it shows is different; that the parcel No 90 was subdivided into the land parcels No 724 and 725. The plaintiff's own case is that the land parcel No 90 was only subdivided into the parcels No 761 and 764, meaning that the entries showing parcels No 762, 763 and 765 are wholly fictitious.

I am not convinced that the plaintiff could have tendered his mutation form on 31 March 1994, have it registered on the same day, and again on the same day, obtain a title deed, forget for a moment that the title deed that he has bears the date 30 March 1994. The pace of the defendant's title seems more plausible. He paid for the mutation on 17 November 1993, and you would expect, that title would ensue a little later, which happened on 31 March 1994.



In addition to the above, I don't see how the plaintiff could have obtained a title deed in his favour on 30 or 31 March 1994, for there was a restriction on the land. This restriction was never lifted and could only be utilized in favour of the person who had placed it, who is the defendant.

I am not persuaded that the two title deeds held by the plaintiff and the defendant were both issued on 31 March 1994. In fact, it did come out that their textures were different, and one would expect the paper used on the same day to be the same. One title deed was prepared later and backdated, and I am persuaded on a balance of probabilities, that it is the title deed of the plaintiff which was backdated and not that of the defendant. I am also persuaded that the entries showing that the land parcel No. 90 was subdivided into land parcels No 761,762,763,764 and 765 were not made on 31 March 1994, they were made later and that is where there is the cancellation of the land parcels No 724 and 725 in that entry. That entry was made after 24 May 2006 and not earlier. It will be recalled that around this time, the plaintiff had complained of missing Green Cards in the Land Registry and he did write letters to the Chief Land Registrar." (Emphasis Supplied).

43. We fully associate ourselves with the sentiments expressed by the learned judge in the above passage and hold that in light of the glaring inconsistencies in the appellant's evidence and the documents that he produced in support of his claim, the trial judge cannot be faulted for concluding that it was the appellant who obtained title to the property known as Nyandarua/ Mawingo/764 fraudulently and that the respondent had obtained title to his property known as Nyandarua/Mawingo/725 genuinely.

44. It is trite law that he who asserts must prove. See *Jennifer Nyambura Kamau V Humphrey Mbaka Nandi* [2013] eKLR where this court stated:

"We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

(Emphasis supplied).

45. Consequently, we have no basis to interfere with the learned judges' finding on this issue and this ground of appeal must fall in its entirety.

46. Turning to the second ground of appeal which is closely related to the first ground of appeal and as to whether trial judge erred in law and fact in finding that all documentations relating to the appellant's title to parcel No Nyandarua/Mawingo/764 were obtained through fraud, we have indeed alluded to the fact that all the documents that were relied upon by the appellant as proof that he had acquired a genuine title to land parcel number Nyandarua Mawingo/764 were full of glaring inconsistencies and there was no plausible explanation from the appellant. It was incumbent upon him to explain these



glaring inconsistencies and he did not. Sections 109 and 122 of the Evidence Act cap 80 are instructive in this regard; the same provides:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

47. The process through which the appellant acquired title to the impugned property was marred with irregularities within his knowledge and the only logical inference that can be made is that indeed the said documentation that he relied on were either fraudulent or forged.

48. In view of the foregoing, we find no grounds upon which we can fault the learned judge finding on this issue. Ultimately therefore, the inevitable conclusion that we arrive at is that the appellant’s appeal is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

49. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF NOVEMBER, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

