



**Nduati v Nduati (Environment and Land Appeal 4 of 2023)
[2024] KEELC 3603 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 4 OF 2023**

**A KANIARU, J
APRIL 30, 2024**

BETWEEN

PETER NGARI NDUATI APPELLANT

AND

ANTONY NJAGI NDUATI RESPONDENT

*(Being an appeal from the judgement of Honourable J.W GICHIMU
SPM dated 20.06.2023 in Runyenjes in MC ELC Case No. 8 of
2022 Antony Njagi Nduati v Peter Ngari Nduati & 2 others)*

JUDGMENT

1. The Respondent – Antony Njagi Nduati- had instituted a suit in the lower court against the Appellant - Peter Ngari Nduati, The Land Registrar Embu County, And The Attorney General- by way of a plaint filed on 16.03.2022. His case was that the appellant is his brother and that they belonged to the Marigu Clan. That during land consolidation within Embu, the original land parcel Kagaari/Weru/382(approximately 144.62Ha) was registered in the name of the County Council of Embu in trust for members of marigu clan.
2. That on or about 1997, the County Council of Embu relinquished the said trust and the parcel of land Kagaari/Weru/382 was subdivided and allocated to the members of the marigu clan. That the respondent was allocated parcel no. 4349 (measuring approximately 1 acre (0.40 Ha) while his two brothers, that is Muriuki Nduati was allocated parcel 4373 (2 acres (0.80Ha) while the other, Njeru Nduati, was allocated parcel 4375 (9 acres (3.31 Ha). That the appellant was not allocated any land as he did not pay the clan the requisite money. That on 11.04.1997, the Runyenjes Land Control Board granted consent to transfer parcel no. 4349 to the respondent and the transfer forms were also duly executed. That the respondent did not immediately register them at the lands office due to financial constraints.



3. That in the year 2016 the respondent submitted the transfer documents for parcel 4349 at the lands office so that the parcel of land could be registered in his name. That the transfer documents could not be registered since the appellant had on 12.10.2016 cautioned the parcel of land. That on 03.05.2017, the appellant without the knowledge of the respondent withdrew the said caution and on 28.07.2017 caused himself to be registered as proprietor of land parcel 4349. He thereafter obtained title to the said land through fraudulent, illegal, unlawful and/or irregular means.
4. In the lower court, the respondent was seeking; a declaration that the registration of parcel no. Kagaari/Weru/4349 in favour of the appellant was illegal, null and void; an order directing cancellation of the registration of the said land in the appellants favour; eviction order to remove the appellant from the said parcel as well as costs of the suit with interest on the basis that the appellant had fraudulently been registered as proprietor of the suit land.
5. The appellant had filed a defence denying any knowledge of fraud and pleading that the registration of the suit land in his favour was carried out openly with full knowledge of the respondent who did not raise any objection to the registration. He further denied that the respondent had ever occupied the land and said that he had long been in possession and use of the suit land. He denied that he was a trespasser.
6. The lower court at Runyenjes heard the case and in a judgement delivered on 20.06.2023 found as follows;
 - a. The appellant does not explain how he got registered as the owner of the suit land whereas his name did not appear anywhere in the list of the beneficiaries.
 - b. That when he was asked by counsel for the respondent how he got to be registered as the owner of the land, he said he did not know.
 - c. That the appellant told the court that he did not pay the sum of Kshs. 350,000 indicated in the copy of the register as contribution.
 - d. That the respondent produced a copy of application for consent of the land control board to transfer the suit land from the county council to him and the appellant did not tender any document to show that the suit land was transferred to him.
 - e. That the respondent proved that the suit land was allocated to him by county council through marigu clan. The appellant was not one of those who were allocated land by the county council through the clan.
 - f. That it is not clear how the Land Registrar Embu County went ahead to register the appellant as the owner of the suit land whereas the letter dated 23.09.1997 which showed the respondent as the owner of the land had been copied to him.
 - g. That the court was satisfied that the appellant had the suit land fraudulently registered in his names. The respondent had proved his case against the appellant.
7. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with twelve (12) grounds as follows:
 1. The learned senior principal magistrate erred in fact and in law in failing to appreciate the contract for sale between the respondent and appellant had been completed hence enforceable.



2. The learned senior principal magistrate erred in fact and in law in ignoring the appellant's testimony that he has been in continuous actual possession of the suit property since 1996 uninterrupted by Antony Njagi Nduati.
3. That the learned senior principal magistrate erred in law and in fact by failing to consider the appellants submissions and exhibited actual bias against the appellant.
4. That the learned senior principal magistrate erred in law and in fact by shifting the burden of proof to the appellant herein.
5. The learned senior principal magistrate erred both in law and in fact in arriving at a decision which was not only manifestly unjust but also against the weight of the evidence on record.
6. The learned senior principal magistrate grossly misdirected himself in treating the evidence on record before him superficially and consequently coming to a wrong conclusion on the same.
7. The learned senior principal magistrate erred in not considering the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
8. The analysis of the evidence as per the judgement is extremely wanting in material aspects.
9. The learned senior principal magistrate misapprehended the evidence on record to a material degree resulting in him arriving at a wrong conclusion.
10. The learned senior principal magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
11. That the learned senior principal magistrate orders have occasioned grave injustice.
12. In view of the circumstances set out herein above the learned senior principal magistrate totally misdirected himself in delivering judgement in favour of the respondent.

The court was urged to set aside the trial courts judgment, allow this appeal and the costs of the appeal and the lower court be awarded to the appellant.

8. It was agreed that the appeal be disposed of by way of submissions. The appellants submissions were filed on 10.01.2024 whereas the respondents submissions were filed on 17.01.2024.
9. The appellant submitted that during land consolidation within Embu, the original land parcel LR No. Kagaari/Weru/382 was registered in the names of the County Council of Embu in trust for Marigu Clan. That on or about the year 1997 the County Council of Embu relinquished the said trust and parcel 382 was subdivided and allocated among clan members of Marigu clan to which both the appellant and respondent belonged. That it was a requirement from the clan that all the beneficiaries of the suit land should meet costs incurred in civil suit PMCC no. 36 of 1991 (Josphat Ireri Kamuruana v Embu County Council & 100 others) which gave the Marigu clan the said land. That the respondent could not pay the required money to the clan and since he did not have the money, the clan approached the appellant and requested him to pay the requisite money for the same land parcel. That he has been in possession of the suit land since 1996 uninterrupted by the respondent.
10. He submitted that the trial court did not take into consideration the definition of fraud as set out in Black's Law Dictionary, 9th Edition at page 131 where fraud is defined as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." That according to him, there was sufficient unrebutted demonstration through his pleadings and evidence that he followed the correct procedure in acquiring title to the suit property. That he purchased the



suit land in good faith and had no knowledge of fraud nor was he a party to any fraud. He relied on the cases of *Alice Chemutai Too v Nickson Kipkirui Korir & 2 others* (2015) Eklr citing the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Anor* (2013) Eklr, *Lawrence Mukiri v Attorney General & 4 others* (2013) Eklr in support of his submissions.

11. The respondent on the other hand submitted that the facts of the case before the trial court as stated by the appellants counsel in his submissions in this appeal are completely different from the facts or evidence relied on by the appellant in the lower court suit. That ground 1 of the memorandum of appeal refers to an alleged contract for sale between the respondent and the appellant which was not an issue that was canvassed in the lower court case and the trial court cannot be faulted for an issue that it was not called upon to determine.
12. That the appellant did not produce sufficient documentary evidence to prove that parcel no. 4349 had been allocated and thereafter transferred to him by his Marigu clan. That the respondent produced a list of beneficiaries of Marigu clan dated 23.09.1997 as exhibit no. 3 and in the said list, the respondent's name is listed as no. 12. That the appellant who is the respondent's brother and a member of Marigu clan did not appear in the said list. That at page 27 of the record of appeal is an application for consent of the land control board to transfer the suit property in favour of the respondent which also indicates that consent was granted on 11.04.1997. There is the stamp of the Division District Officer who was the then Chairman of the land control board.
13. Further, it was submitted that on the other hand, the appellant only seems to have become interested in the suit property on 12.10.2016 when he placed a caution against it. That while it was indicated that the appellant had purchased the parcel of land at a consideration of Kshs. 350,000/= in the green card, the appellant himself was categorical during cross examination that he did not pay the said Kshs. 350,000/=. That he also stated that he did not know when he was registered as owner of the suit land. That the appellant's allegations that he was taken to the land control board by the 3 elders of Marigu clan who also signed the transfer forms in his favour were not proved. That this would have also been contrary to the order issued by the court in Embu CC no. 36 of 1991 which granted the County Council the power to execute all the necessary documents to give effect to the courts judgement in respect of the original clan land, that is parcel 382, out of which the suit land resulted.
14. That the fact that the appellant had no idea when he was registered as proprietor of the suit land and further denying particulars pertaining to registration of the suit land in his favour is a clear indication that the registration of the land in his favour was done under suspicious circumstances. That the allegation by the appellant that he occupied the suit land since 1996 is untrue. That he only forcefully occupied the suit property in the year 2017 after he managed to have himself registered as proprietor fraudulently and such occupation amounted to trespass and the trial court was correct in ordering for his eviction. It was urged that the appeal lacked merit and ought to be dismissed with costs.
15. I have considered the grounds of appeal filed, the record of appeal, as well as the submissions of the parties and their arguments. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it. I'm further reminded that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.



16. From the material before me, I find that the issue for determination is whether the 1st respondent was able to prove that there was fraud in the transfer of land parcel 4349 to the appellant.
17. The 1st respondents case in the lower court was that he had been allocated the suit parcel of land being parcel 4349 by the marigu clan to which he and the appellant belonged. That therefore the land was not awarded to the appellant and the registration of the land to him was done illegally and fraudulently. It has been held time and time again that fraud is a serious allegation and the party alleging it must plead it, particularize it, and strictly prove it to a standard higher than the usual one in civil cases. That standard is higher than a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, *Kinyanjui Kamau vs George Kamau* [2015] eKLR.
18. It was not in dispute that the County Council of Embu held land parcel 382 in trust for the marigu clan. It was also not in dispute that the appellant and the 1st respondent belonged to the said clan and that the Council relinquished its trust over the original parcel of land and caused the same to be subdivided to the members of the marigu clan. What was in dispute was how the land came about to be registered in favour of the appellant yet the 1st respondent claimed that he was the one who was awarded the suit land by the clan. It seemed to have been a condition for allocation that one had to pay some money to defray costs incurred in a previous case.
19. During the hearing, the 1st respondent produced in evidence a letter showing a list of the beneficiaries of the original clan land parcel 382 from the council. The letter was dated 23.09.1997 and the 1st respondent is listed as no. 12 out of 63 members and a beneficiary of 1 acre (0.40 Ha) out of the original parcel 382. The appellants name does not appear on the list. The appellant did not dispute that it was the 1st respondent who appeared on that list. He didn't also challenge the authenticity of the said letter. He only said that it was not all the people who appeared on that list of allocation who were given land.
20. The 1st respondent also produced in evidence a consent from the land control board to transfer the suit land from Embu County Council to him. He also produced a copy of the register of the suit land which showed that the suit land had been registered in favour of Embu County Council in trust for marigu clan on 08.05.1995. It also showed that the appellant was registered as proprietor on 28.07.2017 and a title deed issued on 31.07.2017 after paying a consideration of Kshs. 350,000. During the hearing, the appellant denied that he paid the said consideration. He also stated that he did not know when he was registered as the owner of the suit land. His case was that he paid more than Kshs. 30,000 to the members of the clan committee who were overseeing the distribution of the clan land and that it was the said members who took him to the land control board and signed the transfer form.
21. The appellant did not produce any documents to prove the said allegations. The only documents he made available to the court were sneaked into the record of appeal. They were not part of the lower court record. They therefore do not form part of the evidence that this court can consider at this stage. If the appellant wanted to introduce new evidence he should have asked to be allowed to do so. The 1st respondent on the other hand was able to prove how the land moved from the county council to him as a beneficiary. The appellant on the other hand despite alleging that he was the one who was awarded the suit land, was not able to produce evidence of the same. His evidence in the lower court was clearly wishy-washy and unhelpful. In this appeal itself he is illegally trying to prop up that evidence by sneaking in new documents and making averments that are completely at variance with his evidence in the lower court.
22. It was his own testimony that he did not know when he was registered as the owner of the land. For registration of land to be effected, a party must move the lands office for registration, which means it's a



process that involves the party seeking to be registered. The fact that the appellant does not know when he was registered as proprietor means that he was not involved in the process and makes it irregular. The fact that he also denies having paid the consideration of Kshs. 350,000 for the transfer of the land to him as indicated in the register of the land also proves that there was deception or falsehood in the registration of the land. This makes the whole transaction irregular. I am therefore satisfied that the 1st respondent was able to prove that he is the rightful owner of the suit parcel of land and therefore the registration of the 1st respondent as the legal owner was done irregularly, illegally and fraudulently. I find no reason to interfere with the trial court's judgement and uphold the same. I therefore dismiss this appeal.

23. Each party shall bear their own costs of the appeal and I make this order because the two disputants are brothers.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF APRIL, 2024.

In the presence of Ms. Rose Njeru for the Respondent and Njage Collins for the Appellant.

Court Assistant: Leadys

Interpretation: English /Kiswahili

A. KANIARU

JUDGE –ELC, EMBU

30/4/2024

