



**Ngari v Wachira & 2 others (Environment and Land Appeal  
22 of 2019) [2024] KEELC 4865 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4865 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 22 OF 2019**

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

**BETWEEN**

**EUSEBIA NJOKI NGARI ..... APPELLANT**

**AND**

**JEREMIAH NYAGA WACHIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR MBEERE ..... 2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND SURVEYOR MBEERE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgement of the Principal Magistrate Hon.W  
Ngumi dated 08.08.2019 in M.C.L & E No. 44 of 2018 at Siakago PM's Court)*

**JUDGMENT**

1. The Appellant – Eusebia Njoki Ngari – had impleaded the Respondents – Jeremiah Nyaga Wachira, The District Land Registrar Mbeere & The District Land Surveyor Mbeere - in the lower court seeking inter alia, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be compelled to ascertain, confirm and rectify the appellant's land reference no. Mbeti/Gachoka/3038 and determine that it measures 1.51 Ha and that the court declares that parcel no. Mbeti/Gachoka/3072 measuring 1.21 Ha does not exist; that the Land registrar be ordered to cancel title no. 3072 and vest the same to the plaintiff as part of parcel 3038.
2. In the said case, the Appellant was complaining that she was the absolute owner of parcel no. 3038 and that the 1<sup>st</sup> respondent was the purported owner of parcel 3072 which was irregularly and illegitimately excised and created from the parcel of land belonging to her to reduce the actual physical size of her parcel.
3. During trial, the appellant, who was the plaintiff, was the sole witness and testified as PW1. She relied on her written statement where she had deposed that she had bought land parcel Mbeti/Gachoka 1009 in 2007 from Kinyua Gachoki which parcel of land measured 1.91 Ha, at a purchase price of Kshs.



- 240,000. That the parcel of land originally belonged to Teresia Kangondu Erasto but Kinyua Gachoki had a power of attorney from Teresia. That they had agreed that Kinyua was to be given 1.91 Ha by Teresia Kangondu for the work he had done for her.
4. That before they went to the land control board in 2009, the said Kinyua Gachoki told her that he would not give her the place they had agreed and in the same piece of land, he showed her another piece of land measuring 1.51 Ha and told her that was her piece. That they went to the land control board in 2009 but he hid her search until after the board. That he gave her the mutation form which was interfered with. That instead of showing that the land measured 1.51 Ha, it was cancelled with a pen to indicate 1.21 Ha unlike the search which indicated 1.51 Ha. That Kinyua Gachoki sold 0.30 Ha to Jeremiah Nyaga Wachira, the 1<sup>st</sup> respondent, and he was given Mbeti/Gachoka/3072. That she told the 1<sup>st</sup> respondent that the piece of land he was being sold belonged to her but he did not listen. That therefore she took the matter to court in 2011. She produced in evidence the mutation form for land parcel Mbeti/Gachoka/1009 and two official searches for parcel 3038.
  5. The respondents, then as defendants, had filed a defence in the lower court case in which they denied the appellants allegations. The 1<sup>st</sup> respondent denied knowing the appellant and alleged that they had never engaged in a land sale agreement. The appellant was also accused of filing multiple suits in different courts over the same subject matter and against the respondents. During trial, the respondents did not attend court on the date of the hearing and the matter proceeded with only the appellant testifying.
  6. The lower court at Siakago (Hon. W Ngumi PM) heard the matter and in a judgement delivered on 08.08.2018 held that the appellant had not proved fraud or mistake on the part of the respondent (sic) in respect to land parcels 3038 and 3072, specifically on the issue of measurements, and whether the respondent (sic) contributed to the said fraud. The court determined that the guiding law was section 80 of the Land Registration Act which empowers the court to order rectification of title but on certain conditions being met. The court set out the condition as; the satisfaction by the court that the registration was obtained, made or omitted by fraud or mistake; whether the proprietor to be affected is in possession of land; whether the title was acquired for valuable consideration; whether the acquisition of the title was obtained by way of fraud or mistake contributed to by the defendant.
  7. The court also found that though the evidence of PW1 appeared to be inferring fraud, it did not reveal whether the respondent (sic) was fraudulent or involved in the transfer of land and for that reason the appellant had failed to prove fraud on the part of the respondent (sic). The court also found that the appellant in her pleadings did not specify the particulars of fraud as required under Order 2 Rule 4 of the Civil Procedure Rules which provides as follows;

A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —"

    - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
    - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
    - (c) which raises issues of fact not arising out of the preceding pleading.
  8. The trial court further observed that the appellant in her plaint did not specifically plead facts showing illegality on the part of the respondent (sic) to make the defence or his claim not maintainable. That the appellants plaint as drawn from the onset was defective.



9. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with eight (8) grounds as follows:
  1. That the learned trial magistrate erred in law and fact in not discerning that the mutation was fraudulently altered or forged to add land parcel MBETI/Gachoka/3072.
  2. The learned magistrate failed to detect that the acreage of land parcel Mbeti/Gachoka/3038 was forged to read 1.21 Hectares.
  3. The learned trial magistrate erred in law and fact in failing to discern that land parcel Mbeti/Gachoka/3072 was fraudulently hived from land parcel Mbeti/Gachoka/3038.
  4. The learned trial magistrate erred in law and fact in failing to note that the land Mbeti/Gachoka/3072 was a forgery as its number is not serial to or in continuity with the resultant parcels derived from Mbeti/Gachoka/1009.
  5. The learned trial principal magistrate erred in law and fact in not finding that the land parcel Mbeti/Gachoka/1009 from which resultant land parcel Mbeti/Gachoka/3038, among others, was subdivided into seven (7) portions and not (8) portions and the mutation was forged.
  6. The learned trial principal magistrate was erroneous (sic) in not finding that the acreage in respect of land parcel Mbeti/Gachoka/3038 correctly reads and is 1.51 and not 1.21.
  7. The learned trial magistrate erred in law and fact in dismissing the appellant's suit even in the face of and absence of opposition.
  8. The learned trial magistrate erred in law and fact in focusing on extraneous issues impertinent to the suit per se.
10. The court was urged to set aside the judgement of the trial court and uphold the appellant's claims in the suit. It was also urged that the suit be remitted for re-trial.
11. The appeal was disposed of by way of written submissions. The appellant filed her submissions on 19.06.2023 and a reply to the respondent's submissions on 24.01.2024. The 1<sup>st</sup> respondent filed his submissions on 16.01.2024 and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed theirs on 19.07.2023.
12. The appellant submitted that her parcel of land is Mbeti/Gachoka/3038 which was a resultant subdivision of land parcel Mbeti/Gachoka/1009 among six other parcels and which measured 2 Ha as per the title deed. That unbeknown to her, fraudsters encroached on her land and hived 0.30Ha (3/4 acres) out of it. That the title deed issued to her was not interfered with and reads 2 Ha (5 acres) to date. She argued that transaction of a single survey produces land reference numbers that are alphabetical but that no. 3072 is far from 3038 with which it borders. That the hiving of the land involved forgery and fraud jointly by the respondents in collaboration with others. That the litigation at Siakago law courts failed to address the fraud and misdoings of the respondents and hence this appeal.
13. The Respondents submissions on the other hand were alike in terms of content. They gave an analysis of the facts of the case and submitted, inter alia, that the appellant, from the proceedings and her documents, suggested that the 1<sup>st</sup> respondent acquired the suit property by fraud but failed to discharge the legal burden of proof to support her allegations. That the trial magistrate rightly stated that even the pleadings filed by the appellant in the lower court were defective as she did not specify the particulars of fraud by the 1<sup>st</sup> respondent as required by Order 2 rule 4 of the Civil Procedure Rules 2010. That further to that, the trial magistrate stated that the appellant sought for the court to order rectification



- of the register but did not meet the legally provided conditions before such an order is made. That the principle of law is that he who alleges must prove according to section 107(1) (2) of the [evidence Act](#).
14. The cases of *Kuria Kiarie & 2 Others v Sammy Magera* (2018) Eklr and *Kinyanjui Kamau v George Kamau* (2015) Eklr were cited to support these submissions. It was also submitted that the appellant not only failed to prove that the 1<sup>st</sup> respondent was fraudulently involved in the transfer of land but also failed to specifically plead facts showing illegality. It was submitted further that the trial court considered both facts and the law as well as the documentary evidence produced. That the appellant sought for the rectification of the register, powers which the court has under Section 80 of the [Land Registration Act](#), but failed to meet the conditions stipulated therein. The court was urged not to interfere with the findings of fact of the trial court as was held in the case of *Mary Vundembeka Mujivane v Jacob Omido & Anor* [2019] Eklr. It was urged that the appeal be dismissed.
  15. I have considered the appeal filed 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 v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v 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.
  16. The appellant's main contention is that her parcel of land, being Mbeti/Gachoka/3038, measures 1.51 Ha and not 1.21 Ha as has been suggested. Her reasons for that are that at the time she bought it, she was told that the same was 1.51 Ha. She said that the land was as a result of subdivision of land parcel Mbeti/Gachoka/1009 which originally belonged to Teresia Kangondu and that at the time she bought it, she was told it was 1.51 Ha. That according to the mutation form of parcel no. 1009, it was initially indicated that her parcel of land was 1.51 Ha which measurement was cancelled out and replaced with a new measurement of 1.21 Ha. That this was done fraudulently because the 0.30 Ha was illegally hived out of her parcel of land and sold to the 1<sup>st</sup> respondent.
  17. She argued further that even the official search indicates that parcel no. 3038 was 1.51 Ha which is the same measurement that is there today, which further supports her argument. She also argued that the numbering of the resultant subdivisions of a parcel of land normally follow each other in sequential order which is not the case here. It was for these reasons that she was asking the trial court to find that the parcel of land no. 3072 does not exist and that the same was irregularly and illegitimately created.
  18. As was rightly set out by the trial court, the guiding section of law is section 80 of the [Land Registration Act](#) which empowers the court to order for rectification of titles in the following circumstances;
    - (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
    - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.



19. In the case of Kenya Anti-Corruption Commission v Online Enterprise Limited Kisumu ELC number 708 of 2015 as cited in [Baisbe v Bwana \(Environment & Land Case 229 of 2021\)](#) [2023] KEELC 19129 (KLR) (27 July 2023) (Judgment) the court stated that;

“The court is also empowered under section 80 (1) of the [Land Registration Act](#), to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand.” Emphasis mine.

20. From the above it is clear that in order for a party to succeed in a claim for rectification of a register of land, they must prove that the entries made therein were obtained, made or omitted by fraud or mistake. The provisions of section 107 of the [Evidence Act](#) (cap 80) also place the burden of proof on the person who wishes the court to believe a certain fact. The plaintiff believes that land parcel no. 3072 was fraudulently hived and created from her parcel of land. It is not enough for the plaintiff to simply allege that the same was done fraudulently. She needed to go a step further and prove that fact. As the trial court also observed, the plaintiff did not set out the particulars of fraud on the part of the respondents and therefore it remains unclear how the alleged fraud occurred. That was a fatal omission on her part as the law requires that such particulars be given and also be strictly proved.
21. The court in the case of [Patel & another v MJC & another \(Suing as the guardians of PJP\) \(Civil Appeal 182 of 2019\)](#) [2022] KECA 364 (KLR) (4 February 2022) (Judgment) observed as follows;

“It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.”

The court went on further to say:

In the case of [Vijay Morjaria v Nansingh Madhusingh Darbar & Another](#) [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis ours.

22. Regarding, the standard of proof, the Court in the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR expressed itself as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See [Ndolo v Ndolo](#) [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. 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, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (Emphasis ours)



23. The Court of Appeal in the case of *Ardhi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR as cited in *Hebron Orucho Gisebe & 2 others v Joseph Ombura Gisebe & another* [2022] eKLR in considering the issue of fraud observed as follows: -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, *Precedent of pleadings* 13th Edition at page 427: “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence v Lord Norreys* [1880] 15 App. Case. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v Garrett* [1878] 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

24. This court has looked at the mutation form and the official search made available by the appellant. The mutation form does indicate that there was a previous entry in the measurements of the appellant’s parcel of land which was replaced with the measurement showing that the land was 1.21 Ha. The official search also indicates that the plaintiff’s parcel of land was 1.51 Ha. There is a clear discrepancy in those entries, this could be a genuine mistake. The appellant claims that it was as a result of fraud. However, she did not produce any evidence to prove that fact as is required by law. In the absence of such evidence, this court is inclined to agree with the trial court that the appellant has not proved her case as against the respondents to the required standard to warrant the orders sought.
25. The court consequently finds that the appeal lacks merit and dismisses it with costs to the respondents.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30<sup>TH</sup> APRIL, 2024.**

**Both Appellant and the Respondents absent.**

**Court assistant - Leadys**

**A. KANIARU**

**JUDGE-ELC, EMBU**

**30.4.2024**

