



**Nderitu & another (Representatives of the Estate of Stanley Nderitu Ngari) v Settlement Fund Trustee & 2 others (Civil Appeal 242 of 2012) [2022] KECA 830 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 830 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 242 OF 2012  
HM OKWENGU, K M'INOTI & KI LAIBUTA, JJA  
JULY 29, 2022**

**BETWEEN**

**ARTHUR MATHITU NDERITU ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH WACHIRA NDERITU ..... 2<sup>ND</sup> APPELLANT**

**REPRESENTATIVES OF THE ESTATE OF STANLEY NDERITU NGARI**

**AND**

**SETTLEMENT FUND TRUSTEE ..... 1<sup>ST</sup> RESPONDENT**

**AYUB WANG'ONDU KIBII ..... 2<sup>ND</sup> RESPONDENT**

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

*(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mwera, J.) dated 2nd March 2012 in HCCC No. 2827 OF 1998)*

**JUDGMENT**

1. The appellants, Arthur Mathitu Nderitu and Joseph Wachira Nderitu, who are the administrators of the Estate of Stanley Nderitu Ngari (deceased), are aggrieved by the judgment and decree of the High Court of Kenya at Nairobi (Mwera, J as he then was) dated 2<sup>nd</sup> March 2012 which dismissed with costs a suit by the deceased for a declaration that he was the owner of the parcels of land known as Nyandarua/South Kinangop/3273 and Nyandarua/South Kinangop 3274 (the suit properties), an order for rectification of the register to reflect that ownership, award of general damages, interest, and costs. The suit in the High Court started way back in 1998 when the deceased filed a plaint claiming the suit properties.
2. The deceased pleaded that, in November 1963, the Commissioner of Lands allotted him Plot No. 434, measuring 38 acres, in South Kinangop Settlement Scheme. He took out a loan from the 1<sup>st</sup>



- respondent, the Settlement Fund Trustee, purchased the plot, took possession and started developing it. Upon completing repayment of the loan in 1989, the 1<sup>st</sup> respondent issued him a certificate of outright purchase and undertook to survey and transfer the plot to him, which it failed to do. In 1995, the 1<sup>st</sup> respondent, Ayub Wang'ondy Kibii (the 2<sup>nd</sup> respondent) and the District Land Registrar, Nyandarua (the 3<sup>rd</sup> Respondent) fraudulently caused Plot No. 434 to be subdivided into the two suit properties and transferred and registered South Kinangop 3273 measuring approximately 05 hectares in the name of the 2<sup>nd</sup> respondent. The alleged fraud was duly pleaded and particularised. On that basis, the deceased sought the remedies, already set out above.
3. In his defence and counterclaim dated 1<sup>st</sup> March 1999, the 2<sup>nd</sup> respondent denied the averments by the deceased as well as the particulars of fraud. The 2<sup>nd</sup> respondent averred that Plot No. 434 was subdivided pursuant to a court order dated 9<sup>th</sup> June 1993. By way of counterclaim, he pleaded that he was allotted Plot No. 473B South Kinangop Settlement Scheme in 1986 and that it was located between Plot Nos. 778 and 434. By the order dated 9<sup>th</sup> June 1993 the High Court directed the District Adjudication and Settlement Officer and the District Surveyor to re-plan and establish the boundaries of Plot No. 473B as earlier directed by the Permanent Secretary, Ministry of Housing. The implementation of the court order resulted in subdivision of Plot No. 434 into Nyandarua/South Kinangop/3273 and Nyandarua/South Kinangop 3274 and the 2<sup>nd</sup> respondent was registered as the owner of the former. The 2<sup>nd</sup> respondent further pleaded that the deceased wrongfully continued to occupy and trespass on the 2<sup>nd</sup> respondent's parcel, for which he sought vacant possession, damages, mesne profits and costs.
  4. In his reply to defence and defence to counterclaim, the deceased joined issue with the 2<sup>nd</sup> respondent and stated that Plot No. 473B allegedly allocated to the 2<sup>nd</sup> respondent did not exist and that he (the deceased) was not a party to the suit in which the order to re-plan plot No. 434 was issued.
  5. The 1<sup>st</sup> and 3<sup>rd</sup> respondents filed a joint defence dated 4<sup>th</sup> April 2000 in which they also denied the appellant's claim. They pleaded that, while in occupation of Plot No. 434, the appellant illegally encroached on Plot No. 473B which led to erroneous amalgamation of the two plots as one. Like the 2<sup>nd</sup> respondent, they contended that the subdivision of Plot No. 434 was undertaken pursuant to a valid court order issued by the High Court in Nairobi HC. Misc. App. No. 468 of 1992. The dispute was heard by Ojwang, J. (as he then was), who took the evidence of the deceased. The deceased testified and called one other witness before closing his case. Mwera, J. (as he then was) took over the matter and heard the evidence of the 2<sup>nd</sup> respondent, who did not call any other witness. The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not call any evidence. Both the deceased and the 2<sup>nd</sup> respondent adduced evidence in support of their pleadings and produced documentary evidence. The court file in Nairobi HC Misc App. No 468 of 1992 was also produced before the trial court.
  6. By the judgment challenged in this appeal, the High Court held that, from the evidence, Plot No.434, which was allotted to the deceased, was not surveyed and that its size was not indicated; that both the deceased and the 2<sup>nd</sup> respondent were allotted different plots, which were ascertained and renamed after survey was conducted; that, in the circumstances of this case, the subdivision of Plot No 434 was neither illegal nor fraudulent; that the deceased was aware of the proceedings in Misc App No. 468 of 1992 and even tried to join them; and that there was no basis for cancelling the 2<sup>nd</sup> respondent's registration or awarding the deceased damages. Accordingly, the court dismissed the deceased's suit with costs. As regards the 2<sup>nd</sup> respondent's counterclaim, the court allowed the same and issued an order that the deceased vacates the 2<sup>nd</sup> respondent's portion of the suit properties within 60 days, failing which he would be evicted. The court further awarded the 2<sup>nd</sup> respondent damages in the sum of Kshs 160,000 for trespass and costs.



7. The appellants, the administrators of the estate of the deceased, were aggrieved and preferred this appeal founded on 16 prolixious and meandering grounds which amount to nothing but saying that the learned judge erred in the various findings that he made. Indeed, in their written submissions, the lengthy grounds of appeal metamorphosed into only five issues in which the appellants contended that the trial court erred by:
- i. Holding that the subdivision of Plot No. 434 was legal and valid;
  - ii. Failing to hold that the 2<sup>nd</sup> respondent's title to Nyandarua/South Kinangop/3273 was null and void having been acquired through fraud;
  - iii. Failing to hold that the 1<sup>st</sup> respondent ought to have transferred the entire Plot No 434 to the appellant;
  - iv. Failing to hold that the consent order in Misc App. No. 468 of 1992 was prejudicial to the appellant because he was not heard; and
  - v. Considering the preliminary objection by the 1<sup>st</sup> and 3<sup>rd</sup> respondents which they did not prosecute.
8. The appeal was argued by way of written submissions which the parties orally highlighted. In support of the appeal, the appellants submitted that the trial court erred by upholding the subdivision of Plot No. 434, yet the appellant had purchased the same and was issued with a certificate of outright purchase in 1989. They contended that the suit properties resulted from the subdivision of Plot No. 434 belonging to the deceased, and that the trial court misapprehended the court order to re-plan, which did not mean subdivision of the plot. On whether the 2<sup>nd</sup> respondent's title was null and void due to fraud, the appellants cited sections 26 of the *Land Act*, 2012 and submitted that title obtained illegally, unprocedurally or through corruption is not protected by law. They added that, similarly, under section 158 of the same Act title obtained through fraud or misrepresentation to which the registered person is a party is not protected. The appellants cited the decision of the Environment and Land Court in *Elijah Makeri Nyangw'ra v. Stephen Mungai Njuguna & Another* [2013] eKLR in support of those submissions. They also cited an authority on adverse possession, the relevance of which is not apparent.
9. Turning to whether the 1<sup>st</sup> respondent ought to have transferred the entire Plot No 434 to the deceased, it was contended that, from the evidence adduced before the trial court, the 2<sup>nd</sup> respondent's Plot No 473B existed only on paper and not on the ground, and further, that the allocation of the plot to the 2<sup>nd</sup> respondent was influenced by his position in the then ruling political party, KANU. It was the appellants' view that the deceased ought to have been awarded the entire Plot No. 434 measuring 38 acres because he paid for the whole Plot and was merely waiting for the certificate of title before the illegal subdivision took place. They added that the 1<sup>st</sup> respondent having undertaken to issue the deceased with a certificate of title, it was estopped under section 120 of the *Evidence Act* from alleging that the deceased was not entitled to the entire Plot.
10. Regarding the order issued in Misc App. No. 468 of 1992, the appellants submitted that the trial court misapprehended its tenor and effect as it allowed a re-planning rather than subdivision of Plot No. 434. They added that the deceased was not a party to the application in which the order was issued and that he was adversely affected in violation of the rules of natural justice. In that regard, they relied on the decisions of the High Court in *Republic v National Land Commission & 2 Others ex parte Archdiocese of Nairobi Kenya Registered Trustees* [2018] eKLR and *Egal Mohamed Osman v. Inspector General of Police & 3 Others* [2015] eKLR, and added that no one ought to be condemned unheard.



11. Lastly, regarding the alleged non-compliance with section 13A of the *Government Proceedings Act* raised by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the appellants submitted that the learned judge erred in sustaining it because the objection was never prosecuted. They relied on *Wavinya Ndeti v. IEBC & 4 Others* [2014] eKLR and submitted that the preliminary objection should have been heard first, and the suit determined on its merits only after the objection had been determined and dismissed. The appellants further submitted that the alleged preliminary objection was not on a pure point of law, and that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were obliged to prove that the deceased had not served a notice upon the Attorney General prior to filing his suit, which was an issue of evidence, and that those respondents did not adduce any evidence.
12. For all the foregoing reasons, the appellants urged us to allow the appeal with costs.
13. The 1<sup>st</sup> and 3<sup>rd</sup> respondents opposed the appeal. On the subdivision of Plot No. 434, they submitted it was lawful, as it was based on a court order that directed re-planning as recommended by the Permanent Secretary, Ministry of Lands and Housing. They further argued that the deceased did not appeal against the order on re-planning and that, therefore, the issue could not be validly raised in this matter. It was the position of these respondents that the fraud alleged by the deceased was not strictly proved as required in law. In support of the submission, they relied on *R. G. Patel v. Lalji Makanji* [1957] EA 314 and *Kinjanjui Kamau v. George Kamau Njoroge* [2015] eKLR.
14. Regarding the existence of Plot No. 473B on the ground, the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted that the documents from the Ministry of Lands, whose authenticity was not challenged, confirmed existence of the plot and its allocation to the 2<sup>nd</sup> respondent. It was further submitted that the trial court came to the correct decision that the deceased was not entitled to the entire Plot No 434 because he did not know its precise size and was indeed found to have encroached on Plot No 473B.
15. Regarding the counter-claim, it was submitted that the trial court properly allowed it because the 2<sup>nd</sup> respondent proved that he was entitled to Nyandarua/South Kinangop/3273, but the deceased had trespassed on it and denied him possession. These respondents concluded by urging us not to interfere with the findings of the trial court which had the opportunity to see the witnesses as they testified and specifically noted that the deceased was an evasive and reluctant witness.
16. Lastly, we heard the 2<sup>nd</sup> respondent, who opposed the appeal, submitting that the totality of the evidence on record confirmed the existence of Plot No. 473B and its valid allocation to him. He added that the court order that resulted in the subdivision of Plot No. 434 was merely implementing the directive of the Permanent Secretary, Ministry of Lands and Housing, to re-plan Plot No. 473B. It was this respondent's further submission that there was nothing illegal about re-planning resulting in the subdivision of Plot No. 434; that the deceased was aware of the dispute and the court order; and that the order remains valid because it has never been varied, set aside or appealed.
17. On the issue of fraud, the 2<sup>nd</sup> respondent submitted that the deceased failed to strictly prove the pleaded fraud as he was bound to do. He relied on *Demulla Nanyama Pururmu v. Salim Mohamed Salim* [2021] eKLR and submitted that the deceased was obliged to prove fraud on standard beyond a balance of probabilities, which he failed to do. It was the 2<sup>nd</sup> respondent's view that the deceased never proved the size of the land he was allocated or the actual size of Plot No 434.
18. Lastly, on the preliminary objection, the 2<sup>nd</sup> respondent denied that the objection had been abandoned or irregularly determined. He submitted that the 1<sup>st</sup> and 3<sup>rd</sup> respondent requested the court to determine the same at the hearing. For the above reasons, the 2<sup>nd</sup> respondent urged the court to dismiss the appeal with costs.



19. We have carefully considered the grounds of appeal, the record of appeal, the judgment of the High Court, the written and submissions and the authorities cited by each of the parties. It is common ground that, in this first appeal, we are expected to re-evaluate the evidence that was adduced before the trial court and come to our own independent conclusion thereon, but in so doing, we must give allowance for the advantage which the trial court had of hearing and seeing the witnesses as they testified, which we singularly lack. In *Aroni Sure & 9 Others v. Gesare Nyamaiko*, CA No 94 of 1986, Hancox, JA, (as he then was) cited with approval Lord Simon in *Watt v. Thomas* [1947] AC 484, where the approach of an appellate court is succinctly explained as follows:

“... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but his jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”

20. We shall consider the grounds of appeal as presented by the appellants, but, first, we must straightaway dispose of the issue of the preliminary objection. We agree with the appellants that it was not a pure point of law, facts had to be settled whether or not the Attorney General had been served with the notice under section 13A of the *Government Proceedings Act*. That possibly explains why it was decided the issue be determined at the hearing. Although the 1<sup>st</sup> and 3<sup>rd</sup> respondents did not call any evidence, the learned judge reasoned that the issue was raised in the pleadings, and that the appellants did not address it, thereby leading to the conclusion that the deceased had not served the notice. In our view, however, nothing turns on this issue in this appeal simply because the suit was not determined on the preliminary objection. The learned judge heard evidence and determined the suit on its merits. Whichever conclusion he reached on compliance with section 13A of the *Government Proceedings Act* could not have had any effect on the final outcome. Accordingly, we do not find any merit in this ground. The issue as to whether Plot No. 434 was validly subdivided, and the issue as to whether the entire Plot No. 434 should have been transferred to the deceased are closely intertwined that for convenience they should be addressed together. The evidence on record, which the trial court carefully analysed, is consistent that right from the allotment of the Plot to the deceased in 1963 right up to the issuance of certificate of outright purchase in 1989, the size of the Plot No. 434 was not indicated in any document. Although in his pleadings the deceased averred that the Plot was 38 acres in size, in his evidence he claimed it was 42 acres. Another critical finding was that, contrary to the deceased's assertions, the plot that was allotted to him had not been surveyed, begging the question how the deceased could determine its precise dimensions. This is how the learned judge expressed himself on the issue:

At different times the plaintiff (the deceased) and the 2nd defendant, like other shamba owners in the subject scheme, were allotted plots with numbers. They were shown their portions on the ground. They took possession. They obtained loans from the 1st defendant to establish themselves on those plots. The initial documents relating to those plots, though had plot numbers, did not state the acreage. That means that the plots were not surveyed, contrary to the claim by the plaintiff that his Plot No. 434 was surveyed on its allotment and that it was either 32, 38 or 42 acres. On completion of payment, he was given a certificate



of outright purchase which stated that the issuance of transfer and registration.” (Emphasis added).

21. The learned judge also carefully analysed the documentary evidence on how the 2<sup>nd</sup> respondent was allotted his plot, the subsequent disputes on whether that Plot existed on the ground or not, and how ultimately the Ministry of
22. Lands and Housing resolved the issue. He appreciated the discrepancies in some of the evidence from the Ministry, but, he resolved the discrepancy. The learned judge concluded thus:

This court has traced the genesis of the subdivision of Plot No. 434. When the 2<sup>nd</sup> defendant found that the plot the plaintiff occupied covered his own portion in that he could not develop it, his long and tortuous route took him to the Ministry of Lands and involved various officials on the ground ending with the Permanent Secretary confirming that Plot No. 473B existed on the ground and it had to be demarcated. The 1<sup>st</sup> defendant took long to do so and that provoked the 2<sup>nd</sup> defendant to file Misc App. No. 468/92 for orders to compel the 1<sup>st</sup> defendant to carry out the demarcation. A consent order was recorded. A demarcation followed and Plot No 434 was subdivided to give rise to Plots No. 3273 and 3274. Indeed, in one of those letters from the Ministry, it is hinted that the plaintiff had combined his Plot No. 434 with the defendant’s Plot No 473B. In the circumstances of this matter the court is unable to and null and void. ” (Emphasis added).

23. Having re-evaluated the evidence on record, we cannot find any misapprehension or misdirection on the part of the trial court. The evidence on record shows that after the 2<sup>nd</sup> respondent was allotted his plot, he was shown the same on the ground by a settlement officer and it was vacant at that time. The 2<sup>nd</sup> respondent testified that it was when he was about to start building that the deceased showed up and claimed the plot. Although the appellants heavily relied on the letter dated 7<sup>th</sup> July 1989 revoking allocation of Plot No. 473B to the 2<sup>nd</sup> respondent, that was corrected in the subsequent letter dated 8<sup>th</sup> May 1990, and, like the trial judge, we cannot come to a different conclusion.
24. We earlier on adverted to our duty as a first appellate court and, in particular, the caution that, before we can interfere with the findings and conclusions of the trial court, we must bear in mind that we did not see the witnesses as they testified. In this case, Ojwang, J. (as he then was), who took the evidence of the deceased, was not impressed by him and placed it on record that the deceased was an evasive and reluctant witness. In that respect, we must defer to the trial court and its specific findings on the veracity of the evidence of the deceased.
25. Turning to the issue of fraud, we are in agreement with the respondents that the deceased did not prove fraud strictly and to the required standard of above a balance of probabilities. In *Gouda v. Dodhia*, CA No 21 of 1980 , this Court stated as follows on fraud:

“...fraud is an allegation that must be strictly proved. The fraudulent conduct must be strictly proved more than on a mere balance of probabilities.”

26. On the same issue see also *R. G. Patel v. Lalji Makanji* (supra) and *Richard Akwesera Onditi v. Kenya Commercial Finance CoLtd*, CA.No. 329 of 2009. Fraud cannot be assumed, it must be strictly proved and in this case, the appellants’ reliance on the 2<sup>nd</sup> respondent’s office in KANU is more of conjecture than evidence of fraud. In the same vein, we do not see the relevance of the *Land Act*, 2012 in this matter simply because the registration of the 2<sup>nd</sup> respondent was in 1989. The 2012 statute clearly has no retrospective application.



27. Lastly, on the issue of the court order pursuant to which Plot No. 434 was re-planned, the appellants' complained that it did not authorise subdivision, and that the deceased was not party to it. On the basis of the evidence on record, the trial court found that the deceased was aware of the dispute even before it went to court, he unsuccessfully applied to be joined in the application and applied for stay of execution of the order to re-plan, which application he did not pursue. The order of the court remains valid as it was neither appealed from, nor set aside or vacated on review. In these circumstances, we have no basis for concluding that the order was invalid or that the deceased was denied the right to be heard.
28. As to whether replanning entailed subdivision, we think that is an issue of semantics. The evidence on record indicates the precise nature of the dispute between the deceased and the 2<sup>nd</sup> respondent that the Permanent Secretary wanted resolved. It was to identify the 2<sup>nd</sup> respondent's Plot, which was said to have been taken over by the deceased. It is difficult to surmise what would have been the purpose of the replanning if not to identify the 2<sup>nd</sup> respondent's plot and resolve the controversy. We are not persuaded by the appellants' interpretation of the court order.
29. Having considered all the grounds of appeal, we are satisfied that this appeal has no merit and we dismiss the same with cost to the respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022 HANNAH OKWENGU**

----- **JUDGE OF APPEAL**

**J. M'INOTI**

----- **JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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

**Signed**

----- **JUDGE OF APPEAL**

**DEPUTY REGISTRAR**

