



**M'Rigia v M'Mwoga (Environment and Land Appeal E001 of 2023)  
[2024] KEELC 3770 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3770 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**CK YANO, J**

**APRIL 25, 2024**

**BETWEEN**

**DAUDI KIRIA M'RIGIA ..... APPELLANT**

**AND**

**STANLEY NJERU M'MWOGA ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein was the plaintiff in Marimanti Senior Principal Magistrate Court ELC Suit No. 3 of 2020 wherein he sued the respondent seeking orders of vacation against the respondent, her agents, servants and/or any third party requiring them to vacate from the Appellant's L.R No. Tharaka/Irunduni/13xx, costs and interest and any other relief the court may deem fit and just to grant.
2. It was the appellant's case that he is the registered legal owner of LR No. Tharaka/Irunduni/13xx measuring 1.83 Ha (hereinafter "the suit property). That the respondent herein trespassed on the said land and has been in occupation and utilization of the same land.
3. The appellant stated that he filed a suit through the Land Adjudication Officer, Tharaka and the final decision was that he remains the registered owner of the suit land and the respondent to remain with parcel NO. 4xx.
4. The Appellant pleaded that the respondent was verbally given notice to vacate from the said parcel of land but had refused/failed to vacate thus causing tremendous loss to the Appellant.
5. The respondent filed his defence and counterclaim dated 20<sup>th</sup> July, 2020 wherein he denied the Appellant's claim and put him to strict proof thereof. The respondent further stated that the appellant's cause of action if any was therefore untenable in Law and should be dismissed.
6. In his counterclaim, the respondent stated that when Irunduni Adjudication Section was declared, he walked along the boundary of his parcel of land now known as Tharaka/Irunduni/4xx measuring 3.50



Acres or thereabouts and had the same recorded in his name. That he had bought the said parcel of land in 1978, long before the area was declared adjudication section and had settled on the land with his family. That unknown to him, the Appellant in collusion with unknown adjudication officers caused the respondent's land to be reduced in acreage by 2.00 Acres and fraudulently caused the 2.00 acres to be included in the Appellant's L.R. No. Tharaka/Irunduni/13xx thereby depriving the respondent of his entitlement.

7. The respondent enumerated the particulars of fraud as causing his land No. Tharaka/Irunduni/4xx to be reduced in acreage by 2.00 acres without the consent/knowledge of the respondent, interfering with the respondent's L.R. No. Tharaka/Irunduni/4xx secretly, taking away part of the respondent's land while fully aware that the respondent owned it and was in actual possession and causing registration of part of the respondent's land and part of the suit land.
8. The respondent pleaded that he had been in total occupation of his 3.50 acres which he bought in 1978 and which by then was a period of 42 years and that the Appellant had never occupied or used any part thereof. The respondent's claim against the Appellant was for an order declaring that 2.00 Acres out of LR Tharaka/Irunduni/13xx belongs to him as it forms part of L.R No. Tharaka/Irunduni/4xx.
9. The respondent prayed for the appellant's suit to be dismissed with costs and judgment be entered for him against the Appellant in the counterclaim as follows: -
  - i. That 2.00 Acres out of L.R No. Tharaka/Irunduni/13xx be excised and transferred to the respondent.
  - ii. Costs of the Counterclaim be paid by the Appellant.
10. The Appellant filed a defence to the counterclaim dated 10<sup>th</sup> June, 2022 wherein he denied each and every allegation set out in the counterclaim. The Appellant denied the particulars of fraud attributed to him and put the respondent to strict proof thereof. Further, the Appellant averred that his land parcel title no. Tharaka/Irunduni/13xx and the respondent's land parcel title No. Tharaka/Irunduni/4xx were physically distinct and were individually registered. The Appellant stated that the respondent had encroached onto and occupied his land parcel title no. Tharaka/Irunduni/13xx in mistaken and malicious belief that a portion thereof forms part of the respondent's land parcel title No. Tharaka/Irunduni/4xx.
11. The Appellant pleaded that the counterclaim was based on a fundamental misunderstanding of material facts therefore the same was defective and should be struck out. The Appellant prayed for dismissal of the respondent's counterclaim with costs to the Appellant.
12. Upon considering the matter, the trial court, Hon. S.K. Mbayaki Wafula – PM in a judgment delivered on 20/06/20xx dismissed the Appellant' suit and allowed the respondent counterclaim.
13. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-
  1. That the learned principal Magistrate erred in law in failing to give reasons for his findings in his judgement.
  2. That the court erred both in Law and fact by impliedly making a finding that the appellant herein had proprietary rights over land parcel No. Tharaka/Irunduni/13xx measuring 18 acres while implying that he had no rights over 2 acres of Tharaka/Irunduni/13xx.
  3. That the court erred both in Law and fact by disregarding the documentary evidence produced by the plaintiff.



4. That the court erred both in law and facts in finding that the Appellant did not prove root to his title when there was land adjudication case No.6/20xx and Arbitration Board Case No. 19/20xx which were all decided in his favor confirming his interest in the said land and the said decisions were not appealed against.
  5. That the trial magistrate erred both in law and facts by ignoring the proceedings in land adjudication case No.6/20xx and Land Arbitration board Case No.19/20xx.
  6. That the trial court erred both in Law and fact by allowing the respondent's counterclaim when there was overwhelming evidence to the contrary.
  7. That the trial court erred both in Law and facts by making a finding that the allegations of fraud raised by the defendant in the counterclaim had been proved when the respondent had failed to prove the same.
  8. That the trial court erred both in law and fact when it failed to find and hold that the decisions of Land Adjudication committee and Land Arbitration had not been challenged by the respondent.
  9. That the court erred both in law and fact when it held that the respondent's case was uncontroverted when there was overwhelming evidence by the Appellant on record to controvert that of the respondent.
  10. That the excision of 2 acres which were initially part of Tharaka/irunduni/13xx amounts to cancellation of title yet there was no proof of fraud as required by Law.
  11. That the court generally erred by failing to appreciate the facts of the case and weigh them against the correct legal position which would have yielded a just outcome.
14. The appellant proposed that the Appeal be allowed and the judgement by Hon. Mbayaki Wafula principal Magistrate delivered on 20<sup>th</sup> June,2023 in ELC No.3 of 2020 in Marimanti Law Court be set aside, that the order to excise 2 acres from land parcel No. Tharaka/iranduni/13xx and the same be transferred to the respondent herein be substituted with an order of eviction against the respondent, his agents and servants from land parcel No. Tharaka/irunduni/13xx and the cost of the appeal be borne by the respondent.
  15. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 15<sup>th</sup> December, 2023 through the firm of Mugiira & Associates Advocates while the respondent filed his dated 27<sup>th</sup> February, 2024 through the firm of Murango Mwenda & Co. Advocates.

### **Appellant's Submissions**

16. The Appellant gave a background of the matter and submitted that this being a first appeal, the court ought to reconsider, re-evaluate the evidence and reach its own conclusion. The appellant relied on the case of National Bank of Kenya v Samuel Nguru Mutonya [2019]eKLR.
17. Regarding the issue whether the Appellant had proven the root of his title to land parcel No. Tharaka/ Irunduni/13xx, the Appellant submitted that in 2000, he filed a Land Committee Case No.6 of 2000 against the respondent herein. That in the said case he sought that parcel No.4xx as then was be registered in his name. That that case was decided in favor of the Appellant. That in its determination, the committee directed that the said land parcel be subdivided into two. That the land committee case proceedings were produced during the hearing as plaintiff exhibit No.4. It is submitted that that



- decision was never appealed against and it is subject to the said decision that land parcel 4xx was subdivided into two giving rise to land parcel 1319.
18. The Appellant submitted that had the trial court considered the document as produced by the Appellant in the lower court, it would have no doubts on the basis of the title to land parcel now Tharaka/Irunduni/13xx.
  19. The Appellant further submitted that the respondent filed another Land Committee Case No. 28 of 2004 in which he sought for a declaration that land parcel 13xx belongs to him. That the committee's decision was that land parcel No.13xx to remain registered in the name of the Appellant herein. That the proceedings and decision of the Land Committee case were produced as plaintiff exhibit No.5 during the hearing in the trial court. That that decision was also not appealed against. The appellant submitted that if the learned magistrate had again considered that evidence, then he would have no doubt that the title to land parcel No. Tharaka/irunduni/13xx had a good root.
  20. The Appellant submitted that the respondent never produced any documentation of how he got the two (2) acres he claims should be excised from the appellant's land and cannot therefore be said to have a better root of the impugned land than the appellant herein who has records of how the land parcel he claims came to be registered in his name.
  21. Regarding the trial magistrate's observation in his judgement that the evidence of the respondent was uncontroverted, the appellant's counsel referred to the definition of "controvert" in the Black's Law Dictionary and submitted that the same is not mandatory. That when there is enough documentation, the same should suffice. The appellant's counsel relied on the case of Christine Kalama v Wanja Njeru & Another [2021]eKLR which emphasized the importance of documentary evidence. The Appellant submitted that he produced documentary evidence being the two land Control board (sic) cases which were all in his favor. That the said LCC cases were all in compliance with the procedure as laid down under the Land Adjudication Act. The appellant submitted that the procedure of claiming interests over land during adjudication process is well outlined under the Land Adjudication Act and cited Sections 5, 6, 7, 20 and 21 (1) of the said Act.
  22. It is the Appellant's submission that the suit land underwent the adjudication process and various objections filed. That there was no better evidence that would have been tabled by the Appellant than the proceedings and the decision in those cases which the appellant herein did. The appellant submitted that the respondent did not cast any doubt to the authenticity of the said documents or provide the court with alternative documents for which the court could have relied on and therefore was a mishap on the law for the trial court to find that the evidence of the respondent was uncontroverted.
  23. It is the Appellant's submission that none of the decisions either in LCC No. 6 of 2000 or LCC No. 28 of 2004 which upheld the appellant's interest in the impugned land were ever appealed against. That it was therefore the duty of the learned trial magistrate to appreciate the canons of the best evidence from documentary exhibits so as to assist in making up his mind where the truth lies as it was observed in Christine Kalama case (Supra).
  24. The Appellant further submitted that the fact that he was present during the hearing, produced the said documents and was cross examined by the respondent's counsel over the said documents is enough to controvert the assertions and allegations by the respondent. That on the other hand, the respondent herein never produced any documentation to the contrary. It is the appellant's submission that if the trial court considered the decisions of the two quasi-judicial proceedings, it would have had no doubts as to the root of the appellant's title. The appellant urged the court to find and hold that the appellant's title to the suit land is genuine as its root is traceable.



25. On the issue of lack of sale agreement, it was submitted on behalf of the appellant that considering the age of the witness and when the same is alleged to have been done, it was not unusual for the same to have been lost. Further, that at that time, the land was surveyed. That later, when the land adjudication process commenced, parties had equal right to lay claim on the land parcels where they had interests and disputes resolved as per the *Land Adjudication Act*. The Appellant submitted that both the appellant and the respondent presented their claims as per the aforementioned Land Committee cases which were all decided in the appellant's favour. That no better evidence would have been placed before the trial magistrate than the decision of the two land Committees. Further, that the respondent had leave to appeal the decisions following the procedures laid down in the *Land Adjudication Act* which right he forfeited.
26. The Appellant submitted that even in the absence of a sale agreement, there was enough evidence before the trial court which could have guided the court to the conclusion that the Appellant was the rightful owner of the suit land.
27. Regarding the issue whether the respondent had proven his counterclaim, it was the Appellant's submission that for the reasons discussed above, the respondent's claim that the appellant fraudulently hived 2 acres from his land was not proved. The appellant submitted that the court should consider the two LCC Cases to find that the appellant's title to the suit land indeed had traceable roots and thus genuine. That the respondent's counterclaim should have failed and urged the court to disallow it.
28. With regard to the issue as to whether the appellant had proven his case against the respondent, the appellant submitted that he pleaded that the respondent had trespassed on his land. That he demonstrated that through the chief's letter which was produced as Exhibit 2 and Irunduni adjudication letter produced as Exhibit 3 in the trial court.
29. The Appellant submitted that on the other hand, the respondent, other than filing a defence denying the content of the plaint, never tendered any evidence to demonstrate that he had not trespassed on the said land. That even in his own statement the respondent acknowledged to have trespassed on the land. It is the Appellant's submission that during the hearing, the respondent in his examination-in-chief, chest-thumped that he is in possession and occupation of the said land which is a direct admission of him having trespassed on the appellant's land.
30. The Appellant submitted that it is trite law that pleadings must be substantiated by tendering evidence in support. That pleadings which are not supported by evidence remain to be mere allegations. The Appellant cited sections 107, 108, 109 and 112 of the *Evidence Act*. The Appellant relied on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* (2005) 1 EA 334 and *Evans Nyakwana v Cleophas Bwana Ongaro* (2015)eKLR and submitted that the initial burden of proof lied on the appellant in this appeal, but the same shifted to the respondent the moment the appellant produced documentary evidence to prove his case.
31. Regarding the issue as to whether failure to specify the date (period) of trespass was fatal to the appellant's case, the Appellant submitted that the tort of trespass is continuous in nature, giving a new cause of action each time it is committed. The Appellant cited the definition of a continuous trespass in the *Black's Law Dictionary and Clerk and Lindsell on Torts* 16<sup>th</sup> Edition paragraph 23-01. The Appellant's counsel relied on the case of *Stephen Karanja Chege Ovs- Rural Electrification Authority* (2019)eKLR, *John Kiragu Kimani -vs- Rural Electrification Authority* (2018)eKLR and *Gladys Koskey v Benjamin Mutai* (2017)eKLR, and urged the court to find and hold that the Limitations of Actions Act was not applicable in the instant case since trespass is continuous and therefore failure to specify the date was not fatal. That if anything, the respondent had admitted being on the appellant's land which is what the appellant was contesting as being trespass.



32. The appellant submitted that he had proved his case for trespass as against the respondent and urged the court to find and hold as such. It is the appellant's submission that the appeal is meritorious and deserves to be allowed with costs.

### **Respondent's Submission**

33. The respondent gave brief facts of the case and submitted that the Learned magistrate gave reasons for his findings. That in as much as the appellant has title, it has not been crystalized by failure to cross-examine defence witness. The appellant made reference to page 127 of the Record of Appeal.
34. With regard to ground 2 of the appeal, it was submitted on behalf of the respondent that the appellant and the respondent are related and their parcels of land are near each other. The respondent submitted that it was proved by candid evidence that the 2 acres hived off from the suit land were purchased by the respondent. That the appellant did not dispute the respondent's evidence to that effect.
35. With regard to ground 3 of the appeal, the respondent submitted that the Appellant produced the title deed, chief's letter, Irunduni Adjudication letter and judgment in LCC No. 6 of 2000 and LCC No. 28 of 2004 during the trial. That the title was challenged by the respondent by raising the issue of fraud in obtaining the same. That the appellant was unable to dispute fraud as no evidence was adduced by him on how he obtained the title. The respondent submitted that it is trite law when the validity of title is brought to question, it is not enough for the title holder to dangle the title document withhold providing its root cause like the appellant herein.
36. The respondent further submitted that the issue of title ownership is not an issue to be determined by the chief and once the appellant filed the trial claim, he was unable to prove the same hence it was decided in the respondent's favour. The Appellant also produced Irunduni Adjudication letter. The respondent also submitted that the Irunduni Adjudication letter bears no evidential value to assist the appellant in his claim for ownership.
37. It is the respondent's submission that the judgments in LCC No. 6 of 2000 and LCC No. 28 of 2004 did not mention or indicate the subject matter parcel No. Tharaka/Irunduni/13xx. That it was the appellant's evidence that the respondent owns L.R No. Tharaka/Irunduni/4xx which shares common boundary with the Appellant's L.R No. Tharaka/Irunduni/4xx. The respondent submitted that the appellant's evidence and the above two judgments could not explain the source of L.R No. Tharaka/Irunduni/13xx. The respondent submitted that the said judgment from quasi-judicial organs are not per se binding to the court and especially when the question of fraud is being dealt with.
38. With regard to ground 4 of the appeal, it was submitted on behalf of the respondent that he who alleges must prove. That the appellant sued the respondent in the trial court and failed to adduce any evidence or call witnesses to support his case to the required Civil Standard hence failed to explain the root of his title.
39. Regarding ground 5 of the appeal, the respondent reiterated that the earlier proceedings do not mention the root title of the subject matter L.R No. Tharaka/irunduni/13xx herein hence have no probative value of evidence.
40. On ground 6 of the appeal, the respondent submitted that the appellant was unable to produce any agreement of sale to prove that he had bought the suit land. That the counterclaim was supported by DW2's evidence who stated to the court that he is the one who sold the suit land to the respondent and that that evidence was not contradicted.



41. With regard to ground 7 of the appeal on allegations of fraud raised by the respondent, it was submitted that the respondent pleaded and proved fraud on the Appellant. That the Appellant did not cross examine the respondent so as to controvert the allegations of fraud on his part hence the evidence remained unchallenged and therefore believable.
42. Regarding ground 8 of the appeal, the respondent submitted that the decisions of the committees were not binding on the trial court.
43. On ground 9 of the appeal, the respondent submitted that the appellant apart from failing to produce an agreement of sale to support his claim, did not cross examine the respondent to controvert his evidence and did not call any witness to support his claim and therefore the respondent's case was uncontroverted.
44. With regard to ground 10 of the appeal, the respondent submitted that he was able to lead evidence in court that he purchased 2 acres out of Tharaka/Irunduni/4xx and that the Appellant fraudulently encroached and transferred 2 acres into his LR No. Tharaka/irunduni/13xx which the court correctly ordered be transferred to the respondent. The respondent submitted that that was according to the law applied in cancellation where there is fraud in obtaining the title to land.
45. Regarding ground 11 of the appeal, it is the respondent's submission that the legal position applied by the learned trial magistrate is that whoever alleges must prove. That the appellant failed to discharge his burden leaving the respondent to have a judgment in his favour since its trite that cases are won on evidence.
46. In his submissions, the respondent cited section 107 and 109 of the *Evidence Act* and submitted that he who alleges must prove if the court is to exercise its judicial mind in his favour. That the appellant had the burden to prove his claim which he failed to do since he could not tender any documentary evidence such as an agreement of sale of the suit land and was unable to call any of the alleged witnesses to support his claim. The respondent relied on the case of *BWK v EK & Another* (2017)eKLR which quoted the case of *Henry Thidaya Llong v Manyema Manyoka* (1961) EA 705.
47. On whether the respondent had proven his counterclaim to the required standard in civil suit, it was submitted that the respondent adduced candid and uncontroverted evidence in proof of his counterclaim, hence the trial court properly held in his favour. The respondent's counsel relied on the case of *NWK (Supra) and HMB Kayondo v Somani Amirali Kampala HCCCS No. 183 of 1992* (1995) IV KALR 78
48. It is the respondent's submission that the appeal herein is unmerited and ought to be dismissed with costs to the respondent.

### **Analysis And Determination**

49. I have considered the record of appeal, the grounds of appeal and the submissions made. I have also taken into account the authorities relied on by the parties. This being a first appeal, I am obliged to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.
50. The issues I find for determination are:
  - i. Whether the learned trial magistrate failed to give reasons for his findings in the judgment.
  - ii. Whether the appellant had proved his case to the required standard.



- iii. Whether the respondent's counterclaim was proved to the required standard.
  - iv. Whether the appeal is merited.
51. The appellant contends that the learned trial magistrate failed to give reasons for his findings in his judgment. I have perused the impugned judgment. I note that in the judgment, the trial court briefly analyzed the pleadings and at pages 2 to 3 thereof summarized the appellant's case and proceeded to give four reasons which he concluded made the Appellant's case lack merit. It is clear from these that the trial court gave reasons for its findings and ground 1 of the appeal, in my view, has no merit.
52. The next issue to consider is whether or not the decision reached by the trial court was against the weight of the evidence adduced. It was the appellant's case that he is the registered owner of the suit land LR No. Tharaka/Iranduni/13xx measuring 1.83 Ha. That the respondent had trespassed into and was in occupation and utilization of the said land. The appellant pleaded that he had filed a suit through the Land Adjudication Officer, Tharaka and the decision was that the appellant remains the registered owner of the suit land while the respondent remains with parcel No. 4xx. The Appellant was praying for an order for the respondent to vacate from the suit land.
53. In his counterclaim, the respondent pleaded that he bought his land LR. No. Tharaka/Irunduni/4xx measuring about 3.50 acres in the year 1978 before the area was declared an adjudication section and had it recorded in his name and settled therein with his family. The respondent accused the appellant of fraudulently causing 2.00 acres of the respondent's land to be included in the appellant's land, thereby depriving the respondent of his entitlement.
54. During the hearing, the appellant adopted his statement dated 22<sup>nd</sup> April 2021 as his evidence-in-chief and produced copies of title deed for his land, chief's letter dated 26<sup>th</sup> January, 2010, Irunduni Adjudication Section letter, and judgment in LCC No. 6 of 2000 and LCC No. 28 of 2004 as Exhibits. He was then cross-examined and re-examined.
55. On his part, the respondent relied on his statement dated 20<sup>th</sup> August 2020 wherein he stated that he bought the land which was later registered as LR. No. Tharaka/Irunduni/4xx from one M'Birika Kirogoto in 1978. That later, the appellant who is related to him bought land that share a common boundary with his. He called one witness (M'Birika Kirogoto) who testified that he sold land to the respondent.
56. From the material on record, it is evident that both parties are registered owners of their respective parcels of land. The appellant is the registered owner of the suit land LR No. Tharaka/Irunduni/13xx while the respondent is the registered owner of land LR No. Tharaka/Irunduni/4xx. The two parcels share a common boundary. It is also apparent from the evidence on record that there have been disputes between the appellant and the respondent over the suit land. The appellant produced judgments in LCC No. 6 of 2000 and LCC No. 28 of 2004 which decided in his favour. The appellant is holding title for the suit land which is prima facie evidence of ownership. In the case of Republic v Senior Registrar of Titles Ex-parte Brookside Court Ltd [2012]eKLR, it was held that statutorily, the sanctity of the title to land is assured and protected under Section 24, 25 and 26 of the *Land Registration Act* which provide as follows:

24 (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, and

(b) the registration of a person as the proprietor of a lease shall vest that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges



belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:

- a. To the leases, changes and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26 (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restriction and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -

- a. On account of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.

57. Having looked at the material in this case, there was no evidence to prove that the appellant's title was acquired fraudulently or illegally. Indeed, the material on record confirm that previous proceedings and decisions were made in favour of the appellant. There is no evidence that the said decisions had been set aside on appeal and therefore the judgments in LCC No. 6 of 2000 and LCC No. 28 of 2004 still stand. The court finds and holds that the appellant had proved the root of his title and is the legal owner of the suit property to the exclusion of all others, including the respondent.

58. It is clear that the respondent's counterclaim was based on fraud. To succeed in claiming fraud, the respondent not only needed to plead and particularize it, but also to present watertight evidence upon which the court could make a finding in his favour. It is trite law that any allegations of fraud must be pleaded and strictly proved.

59. In the case of *Kuria Kiarie & 2 Others v Sammy Magera* (2018)eKLR, the court of Appeal held as follows:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states 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.”

60. As regards the standard of proof, the court in the case of *Kinyanjui Kamau –vs 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; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in *Criminal Cases...*” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

61. Therefore, the next question is whether the respondent presented sufficient evidence to prove the claim of fraud to the required standard. I am of the opinion that the respondent did not provide sufficient proof in regards to fraud and collusion of the Appellant with the alleged unknown adjudication officers. Therefore, the trial court erred in finding in favour of the respondent. The appellant as real title holder having led evidence that he is the legal bonafide owner of the suit property, it is prima facie evidence that the Appellant got the suit land procedurally and there was no proof of fraud.
62. I opine that the trial court was wrong when it held that in as much as the appellant has title, it had not been crystallized by failure to cross examine defence witnesses. One does not lose their rights by failure to cross examine a party because the Law provides that even a party has a right to remain silent. That does not mean that the evidence of the respondent was uncontroverted.
63. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In this case, it was the respondent who was required to prove the alleged fraud to the required standard. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides:
- (1) 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.
64. There is also the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See *Isca Adhiambo Okayo v Kenya Women’s Finance Trust KSM CA Civil Appeal No. 19 of 2015* [2016]eKLR). That is captured in sections 109 and 112 of the Act as follows:
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.



65. The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No. 342 of 2010[2013]eKLR as follows:

“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.”

66. To this end am certain that the respondent did not prove his claim of fraud.

67. The Appellant’s claim was founded on trespass which was continuing. It is not in dispute that the respondent has been in possession of the suit land and the Appellant sought for orders of vacation of the respondent from the suit land.

68. From the foregoing, I am persuaded that the trial court erred when it failed to rely on the evidence produced by the Appellant in the case. Further, I am not persuaded that the respondent proved his claim for fraud in the counterclaim to the required standard. On a balance of probabilities, I am inclined to allow the Appellant’s case. The appeal has merit.

69. I therefore allow the Appeal herein and overturn the judgement of the learned Principal Magistrate in *Marimanti* dated 20<sup>th</sup> June, 2023 and set aside the orders therein. I substitute the same with an order allowing the appellant’s suit and dismiss the respondent’s counterclaim.

70. The appellant shall have costs both in the lower court and in this appeal.

71. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> APRIL, 2024**

In the presence of:

Court Assistant – Martha

Murango Mwenda for Respondent

No appearance for Appellant

**C.K YANO,**

**JUDGE**

