



**Ngungu v Ndege (Environment and Land Appeal E013 of 2023)  
[2024] KEELC 1815 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1815 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E013 OF 2023**

**JM MUTUNGI, J**

**APRIL 12, 2024**

**BETWEEN**

**DOMINIC WAMWEA NGUNGU ..... APPELLANT**

**AND**

**JOSPHAT NGARE NDEGE ..... RESPONDENT**

*(Being an Appeal against the Judgment and Decree of the Hon. A.K. Ithuku, Chief Magistrate sitting in Kerugoya CMCC No. 13 of 2016 and dated 2.12.2021)*

**JUDGMENT**

1. The subject of this appeal is land parcel Mwerua/Kabiriri/2720, measuring 0.76 Hectare (suit property) that was originally owned by the Appellant. From the proceedings of the lower Court, the suit property was subdivided from the LR Mwerua/Kabiriri/1675 and was sold vide a sale agreement dated 1.11.2011 to the Respondent.
2. The background to this appeal is that by dint of a Plaint dated 18.01.2016, the Respondent herein as the Plaintiff in the lower Court, sought for an order of vacant possession of the suit land and a permanent injunction restraining the Appellant, his servants, heirs, or any person claiming under him from trespassing, cultivating, occupying, wasting, leasing or in- any unlawful way interfering with the Respondent's quiet possession and enjoyment of his proprietary rights over LR No. Mwerua/Kabiriri/2720. . The Respondent claimed that he was the legal and registered owner of the suit land but the Appellant had refused to vacate from the suit land. He gave evidence to the effect that he was engaged by the Appellant to undertake the subdivision of LR/Mwerua/Kabiriri/1675 belonging to the Appellant (Defendant before the lower Court) and as consideration, a portion measuring one (1) acre being LR No. Mwerua/Kabiriri/2717 would be transferred in his name as the payment for his services. He testified that he entered into another agreement with the Appellant dated 01/11/2011 for the sale of LR Mwerua/Kabiriri/2720 for the purchase price of Kshs. 340,000 out of which he paid Ksh. 250,000 upon the execution of the agreement. The balance of Kshs. 90,000 was paid vide the acknowledgment



- dated 20.12.2011. The Respondent further testified that the parties to the agreement signed all the relevant documents and the transfer of the suit land was effected in his name. The Respondent stated that he was exonerated by the DCI of the fraud allegations levelled against him by the Appellant.
3. The Appellant filed his statement of Defence and Counterclaim dated 23.02.2016 vide which he denied the content of the Plaintiff and averred that the Respondent acquired the suit land fraudulently. The Appellant by way of counterclaim pleaded that he had entered into one sale agreement for the sale of a one-acre portion of land with the Respondent and that the one-acre portion was to be excised from LR Mwerua/Kabiriri/1675. He stated that this agreement related to LR/Mwerua/Kabiriri/2717 and that upon subdivision, the Respondent transferred LR Mwerua/Kabiriri/2717 but additionally the Respondent fraudulently transferred LR/Mwerua/Kabiriri/2720 comprising of 0.76 Ha to his name. The Appellant stated that he did not transfer the suit land to the Respondent and contended that he only discovered about the fraudulent transfer of LR Mwerua/Kabiriri/2720 to the Respondent when the National Irrigation Board visited him seeking to take an inventory of all the fixtures and fittings that were in the suit land for purposes of compensating the owner and acquiring the land. The Appellant filed an amended statement of defence and counterclaim dated 20.11.2019 where he sought for an order for the cancellation of the certificate of title and its reversal to the name of the Appellant. In his evidence however, DW2 who was a son-in-law of the Appellant corroborated the evidence given by the Respondent by confirming that indeed he had witnessed the sale agreement dated 1.11.2011 and that he had appended his signature in the sale agreement between the parties.
  4. The Respondent filed a Reply to Defence and Defence to the Counterclaim dated 9.03.2016 and reiterated that he purchased the two parcels of land LR Mwerua/Kabiriri/2717 and 2720 from the Appellant, both of which are registered in his name as the proprietor.
  5. The trial Court in its judgment dated 2.12.2021 dismissed the Appellant's counterclaim and entered judgment in the favor of the Respondent. As a consequence, the Appellant was ordered to vacate from the suit land and an order for a permanent injunction restraining the Appellant and/or his servants, agents or heirs from trespassing, cultivating, occupying, wasting, leasing or in any way entering, interfering whatsoever with the suit land, was issued.
  6. Aggrieved and dissatisfied with the decision of the Court, the Appellant appealed to this Court against the decision and filed a Memorandum and Record of Appeal dated 20.12.2021 and 10.11.2022 respectively.
  7. The Appellant's Memorandum of Appeal set out 4 grounds of appeal as follows: -
    - I. That the Learned Magistrate erred in law and fact in entertaining the Respondent's claim despite the Appellant having overwhelming evidence in support of his claim.
    - II. That the Learned Magistrate erred in law and fact in disregarding the Appellant evidence and that of witnesses thereby arriving into a wrong decision.
    - III. That the Learned Magistrate erred in law and fact in favoring the Respondent's evidence without considering the Appellant evidence.
    - IV. That the judgment of the lower Court is against the weight of evidence of the Appellant.
  8. The Appellant prayed that the Court do set aside the judgment in Kerugoya CMCC No. 13 of 2016.
  9. The Appeal was canvassed by way of written submissions. The Appellants filed their written submissions on 12.07.2023. The Appellant submitted on two issues, to wit, the role of this Court as an appellate Court; and whether he was entitled to the prayers he was seeking. In regard to the first issue, the Appellate relied on the case of *Mursal & Another v Manese (Suing as the legal administrator*



*of Dalphine Kanini Manesa* (2022) KEHC 282 (KLR) where Mativo, J (as he then was) in line with the principle established by the Court of Appeal in the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 outlined the role of a first appellate Court as follows at paragraph 4 of the judgment:

- “4. A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate state. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a Court of first appeal can appreciate the entire evidence and come to a different conclusion.”

The Appellant submitted that he only transferred LR No. Mwerua/Kabiriri/2717 and did not transfer parcel 2720 to the Respondent. The Appellant faulted the Learned Trial Magistrate for failing to consider why the Respondent had not taken possession of the land in 2011 when he allegedly purchased the same and only asked for vacant possession in 2016 when the issue of compensation by the National Irrigation Board came up. Counsel for the Appellant submitted that the Court should have questioned why vacant possession had been given for LR Mwerua/Kabiriri/2717 and not for LR Mwerua/Kabiriri/2720. On whether the Appellant was entitled to the orders that he was seeking, the Appellant submitted that he was entitled to the orders as he was condemned unheard by the trial Court. He pegged this assertion on paragraph 21 of the trial Court’s judgment and submitted that the trial Magistrate determined the counter-claim before considering his defence.

10. The Respondent filed his written submission on 31<sup>st</sup> October 2023. Counsel for the Respondent and raised one issue for consideration; whether the learned Magistrate erred in law and fact in allowing the Respondent’s claim and dismissing the Appellant’s Counter-Claim. Counsel for the Respondent submitted that the Respondent had adduced sufficient evidence to show and demonstrate that he had purchased the suit land, obtained the relevant consent to warrant the title to be transferred in his name.
11. I have considered the record of appeal and the submissions of the parties and the issues that arise for determination in the appeal are:
  - I. Whether the Trial Magistrate erred in law and fact in finding in favor of the Respondent as against the Appellant, in regards to the prayers sought.
  - II. Whether or not the Court denied the Appellant a chance to be heard.
12. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 to ascertain whether the decision rendered by the trial Court was justified having regard to the evidence presented before the Court. The grounds of appeal basically concern the assessment and evaluation of the evidence by the Learned Trial Magistrate and I will therefore consider all the grounds of appeal together.
13. The Appellant contended that the Trial Magistrate erred in law and fact for finding that the Respondent was the legal owner of the suit land and for issuing a permanent injunction against him. He submitted that the Trial Court failed to interrogate why the Respondent, having bought the land in 2011, only showed interest in the suit land after the National Irrigation Board visited to take the suit land’s inventory for purposes of compensation. Counsel for the Appellant further submitted that the Court had not interrogated the reasons why the Respondent had obtained vacant possession for LR



Mwerua/Kibiriri/2717 and not for the suit land. In Response, the Respondent submitted that he had followed due process in acquiring the disputed suit property and acquired a valid title that deserved protection under the law.

14. In the Judgment the subject of this appeal, the Trial Magistrate agreed with the submissions of the Respondent, that the Appellant had failed to prove fraud. The Trial Court relied on the case of *R.G Patel v Lalji Makanji* (1957) EA 314 where the Court of Appeal for Eastern Africa held that proof of fraud in civil cases has to be proof higher than proof on balance of probability though not so heavy as to require proof beyond reasonable doubt.
15. The standard of proof where fraud is alleged in civil matters has been held in decided cases to be higher than the ordinary standard of balance of probabilities. See *Kinyanjui Kamau v. George Kamau Njoroge* (2015) eKLR; and *Bruce Joseph Bockle v Coquero Ltd* (2014) eKLR. The particulars of fraud must be specifically pleaded and strictly proved. This is because allegations of fraud are of serious nature and may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. In *Emfil Ltd V. Registrar of Titles Mombasa* (2014) eKLR, this Court pronounced itself as follows on the issue: -

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the Court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the Respondents to totally ignore the rules of evidence.”
16. The cancellation of the Respondent's title is precisely what the Appellant sought to achieve by his counter-claim in which he alleged that the Respondent obtained the suit property through fraud, particulars of which are enumerated below:
  - a. Causing the suit land to be transferred to his name whereas the Defendant had neither sold to him nor signed any transfer forms.
  - b. Causing the Defendant who is illiterate and well advanced in age to sign the sale agreement without any family member not even the wife, acknowledgment receipts, and land transfer forms alleging that the documents were only meant for enabling the process of subdivision of the Defendants land parcel No. Mwerua/Kibiriri/1675.
  - c. Obtaining the consent for transfer of LR Mwerua/Kibiriri/2720 when the Defendant was not involved.
17. There was no dispute that the Respondent was registered as proprietor of Land Parcel LR Mwerua/Kibiriri/2720. The issue was whether the Respondent had obtained registration fraudulently as alleged by the Appellant. The Learned Trial Magistrate after evaluating and analysing the evidence came to the conclusion that no fraud had been proved on the part of the Respondent in the acquisition and registration of the title in his name. The Learned Trial Magistrate held that there was evidence to support the Respondent's assertion that he followed due process in the acquisition of the land. He held there was a sale agreement, evidence of payment of the consideration, consent of the Land Control Board, payment of stamp duty on transfer and copy of Official Search Certificate dated 20/04/2012 indicating that the transaction was duly completed and the Respondent registered as the proprietor of the suit land.

Under Section 26 (1) (a) & (b) of the *Land Registration Act*, 2012 the title of a registered proprietor is absolute and indefeasible and may only be challenged on grounds of misrepresentation or fraud and/



or on grounds that the title was illegally and unlawfully acquired through a corrupt scheme in respect of which the proprietor is proved to be a party. Section 26 (1) (a) & (b) of the Act provides as follows:

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, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground 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, unprocedurally or through a corrupt scheme.

I have perused the record and I am not persuaded that the Appellant adduced any credible evidence to prove that the Respondent acquired title to the suit land fraudulently. The burden to prove fraud rested on the Appellant and as rightly held by the Learned Trial Magistrate, he did not discharge that burden.

- 18. The only evidence the Appellant relied on to prove fraud was the testimony by his son-in-law who had claimed that he had not witnessed the agreement between the parties. Under cross-examination however, DW2 contradicted this assertion when he admitted that it was his signature in the sale agreement dated 1.11.2011 and that he had witnessed both parties sign the agreement. The Appellant also alleged that he had reported the matter to the police but he did not produce any investigation report to show that the Respondent had been found culpable of fraudulently transferring the suit land to his name.
- 19. From my evaluation of the evidence on record, the trial Magistrate cannot be faulted for that finding. The Appellant merely alleged fraud but the evidence that he adduced fell far short of what was required to prove fraud as required in the cases cited above. In contrast, I find that the Respondent proved to the required standard that he is the rightful owner of the suit land having bought it from the Appellant and subsequently being issued with a certificate of title. The Learned Trial Magistrate having upheld the Respondent's title in my view properly found the Appellant's counterclaim to be not proved as the proof of the same was dependent on the Appellant proving the Respondent had fraudulently acquired the title to the suit property which he failed to do.

#### **Whether or not the Court denied the Appellant a chance to be heard**

- 20. Article 50 of the Constitution of Kenya provides for the right to have a fair hearing and under Article 50 (1) provides thus:

Article 50(1) provides:

Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, amounting independent and impartial tribunal or body.

- 21. My understanding of the right to be heard in a trial of a civil case encompasses, on the part of a Defendant, the right to be notified of the existence of the suit and the dates when Court attendance is required, liberty to file documents in response to the Plaintiff's claim and right to attend Court and participate in the proceedings as provided for in the law. The Court record shows that the Appellant was served with summons to Enter Appearance as a way of notifying him of the existence of the suit.



In response thereto, he filed a Memorandum of Appearance, notice to act in person, along the way he appointed an Advocate to represent him, he filed his Statement of Defence and Counterclaim, further amended his Statement of Defence and Counterclaim and participated in the pre-trial preparations. In addition, the proceedings on record show that the Appellant testified and called two witnesses to give their testimony in support of his Defence and Counterclaim. In my view, the Appellant was not denied the opportunity to be heard or to present his case. The evidence on record demonstrate sufficiently that the Appellant was afforded the right to be heard and was heard by the Court.

22. The upshot of my evaluation of the record and the evidence is that this appeal is devoid of any merit. I dismiss the same with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA VIDEO LINK AT KERUGOYA THIS  
12<sup>TH</sup> DAY OF APRIL, 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

