



**Wanjau v Kairegi & 4 others (Environment and Land Appeal  
E040 of 2022) [2024] KEELC 6633 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 6633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E040 OF 2022**

**MD MWANGI, J**

**JUNE 27, 2024**

**BETWEEN**

**NAFTALLY WAMBUGU WANJAU ..... APPELLANT**

**AND**

**KIRAGU KAIREGI ..... 1<sup>ST</sup> RESPONDENT**

**AMOS KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**DAVID MWAI KIRAGU ..... 3<sup>RD</sup> RESPONDENT**

**JANE MUGURE NDUNG’U ..... 4<sup>TH</sup> RESPONDENT**

**GEOSTAR PROPERTIES COMPANY LTD ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant in this matter filed his appeal by way of the Memorandum of Appeal dated 20<sup>th</sup> May, 2022. The Appeal is from the Judgment of Hon. H.M. Nyaberi, Chief Magistrate, dated 19<sup>th</sup> May, 2022. The Appellant raises 4 grounds of Appeal namely:
  - a. That the Lower Court erred in Law and in fact by dismissing the Plaintiff’s suit;
  - b. That the Lower Court erred in Law and in fact by ignoring clearly the pleadings, both the oral and documentary evidence and the submissions filed by the Plaintiff without any basis in Law and fact.
  - c. That the Lower Court in its finding erred in fact and in law by considering issues that were not pleaded by the parties in their pleadings nor adduced in evidence thus effectively bending/distorting the rules of Law and natural justice;



- d. That the Lower Court erred in law and in fact by dismissing the Plaintiff's suit and allowing the 1<sup>st</sup> Defendant's Counter-claim.
2. The Appellant prays that the entire judgment of the Lower Court in SPMCC 6275 of 2019 be set aside and that the suit in the Lower Court be allowed as pleaded in the Plaintiff; and the Defence and Counter-claim (by the Respondent herein) be dismissed.

**Court's directions:**

3. The Court's directions were that the appeal be heard by way of written submissions. The Appellant complied; the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents too. The 2<sup>nd</sup> Respondent acting in person instead filed a replying affidavit.

**Submissions filed by the parties**

4. The Appellant in his submissions argued that the Vendor did not testify to rebut the evidence of him selling the suit property to the Plaintiff. The vendor did not therefore adduce evidence to rebut the Plaintiff's pleadings, and the evidence of forgery of the agreement yet he had filed a Counter-claim seeking a declaration that he was the owner of the suit plot No. 016. It is the Appellant's case that the Lower Court ignored the Plaintiff's express pleadings on forgery and his evidence of not having signed the alleged agreement for exchange.
5. The Appellant submitted further that he had possession of the suit property at the time of filing suit and during the trial. The Plaintiff on his part was categorical and brought out the fact that the part of the alleged exchange agreement was handwritten while the reverse side was typed. No evidence was offered to explain the obvious discrepancy. The burden of proof shifted to the vendor to offer an explanation.
6. The Appellant referred to sections 107, 108 & 109 of the Evidence Act and cited a number of decided cases in support of his position. He referred to the case of Adulkadir Giro Tutu Vs-Martin Kimanthi Guantai (2022) EKLK amongst others in support of his position.
7. The 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants on their part submitted that the Learned Magistrate directed himself properly on the evidence on record as well as the applicable law and principles focusing on the real issues as pleaded by the parties. They argued that the appeal was devoid of merit. They further contended that the 4 grounds of appeal in the memorandum of appeal are unfounded, uncorroborated and amount to a belated attempt to revive an otherwise dead case.
8. The 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents pointed out that the 2<sup>nd</sup> Respondent had filed a replying affidavit instead of submissions; contrary to the directions of the court. They submitted that the same was alien in law and contrary to the directions given by the court on the disposal of the appeal. They urged the court to expunge it from the record. They identified 5 issues for determination, namely:
  - i. Whether the exchange agreement dated 14<sup>th</sup> October 2014 between the Appellant and the 1<sup>st</sup> Respondent is a valid instrument of effecting disposition of an interest in land.
  - ii. Whether the exchange agreement dated 14<sup>th</sup> October 2014 between the Appellant and the 1<sup>st</sup> Respondent was a forgery.
  - iii. Whether the exchange agreement dated 14<sup>th</sup> October 2014 indeed existed.
  - iv. Who is the legitimate owner of plot No.16?
  - v. Who should bear the costs of the appeal.



9. The 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents submitted that indeed the parties entered into an exchange agreement dated 14<sup>th</sup> October 2014 whereby the Appellant acquired plots No. 050 & 051 from the 1<sup>st</sup> Respondent, whereas the 1<sup>st</sup> Respondent acquired ownership of plot No. 016 and 019 from the Appellant. They submitted that the agreement satisfied the provisions of section 3(3) of the Law of Contract Act. They referred to the case of National Bank of Kenya Ltd -vs- Pipe Plastic Samkolit (K) Ltd & ANO (2001) eKLR, where it was held that a court of Law cannot rewrite a contract between parties once it has been ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
10. The Respondents submitted that the agreement in their case was valid and enforceable. The allegations by the Appellant that the said agreement was a forgery or fraudulent was not proved. In any event what the Appellant purports to use as proof in his submissions was not pleaded in the original suit. Allegations of fraud, must be pleaded, particularized and strictly proved. The Respondents further submit that he who alleges must prove. The Appellant had not discharged the burden of proof.
11. The Respondents finally submit that the 1<sup>st</sup> Respondent is the legal owner of plot 016 and 019. The exchange agreement is conclusive proof of that fact. Consequently, the Respondents pray for the dismissal of this appeal with costs.

### **Analysis and Determination**

12. I agree with the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents that the replying affidavit filed by the 2<sup>nd</sup> Respondent has no basis in Law. The court's directions were clear on the disposal of the appeal. In any event the 2<sup>nd</sup> Respondent did not seek leave to adduce further evidence at this stage, this being an appeal. Consequently, the replying affidavit filed by the 2<sup>nd</sup> Respondent is struck off and expunged from the record of this court.
13. Going to the appeal, I may as well say that the law is well settled on the duty of the 1<sup>st</sup> Appellate court. As Mativo J (as he then was) stated in the case of Mursal & Ano vs Manese (suing as the legal administrator of Dalphine Kanini Manesa){2022} (Civil Appeal E20 of 2021) KEHC 282 (KLR)(6 April 2022) (Judgement),
 

“ A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
14. The same position was enunciated in the case of Selle & another -vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123, where the court stated that:
 

“ .... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court...is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
15. The Appellant was the plaintiff in the case before the trial Magistrate. In his plaintiff dated 23<sup>rd</sup> August 2019, the Appellant alleged that he was the owner of Plot No. 16/126/353 block 126/353 having



- purchased it for value. He was allegedly issued with a certificate of the ownership by 5<sup>th</sup> Defendant. It was his case that he took possession of the plot in 2012 and had been since then been in occupation utilizing it for growing food crops.
16. The Appellant further had pleaded that it was the 1<sup>st</sup> Defendant (now 1<sup>st</sup> Respondent) who sold the suit property to him for value at the figure of Kshs 150,000/= which he duly paid. The transaction was allegedly witnessed by the 2<sup>nd</sup> & 4<sup>th</sup> Respondents. In spite of the lawful sale, the plaintiff claimed that on or about 26<sup>th</sup> April 2019, the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent unlawfully trespassed into the suit property and destroyed his fence and food crops. He reported the matter at Kamulu Police Station.
  17. The trespass by the 1<sup>st</sup> & 3<sup>rd</sup> Respondents prompted the Appellant to file the case before the trial court seeking an order of permanent injunction and an order that the plot belonged to him, special damages and costs of the suit.
  18. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents responded to the plaintiff's claim by way of a joint statement of Defence and Counter-claim dated 18<sup>th</sup> October 2019. The 4<sup>th</sup> Respondent denied the Appellant's claim affirming that the suit property belonged to the 1<sup>st</sup> Respondent therein. They asserted that the Appellant had no proprietary rights over the suit property. The 2<sup>nd</sup> Respondent herein subsequently filed a notice to act in person. He did not however file any subsequent statement of Defence other than the one that had been filed jointly with the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  19. In his Counter-claim the 1<sup>st</sup> Respondent asserted that he was the sole exclusive owner of the suit property.
  20. While admitting that he had sold the suit property on the 10<sup>th</sup> August 2012, for the sum of Kshs 150,000/=, the 1<sup>st</sup> Respondent averred that the Appellant approached him in August 2014 with a proposal to exchange the suit property with another property on the premises that he wanted to own two adjoining plots. The 1<sup>st</sup> Respondent agreed to the Appellant's request culminating in the signing of the land exchange agreement on 14<sup>th</sup> October 2014 whereby the Appellant surrendered the suit property and another plot to the 1<sup>st</sup> Respondent while the 1<sup>st</sup> Respondent surrendered two other adjoining plots to the Appellant. The Appellant did not however surrender to the 1<sup>st</sup> Respondent the certificate of ownership of the suit property despite the 1<sup>st</sup> Respondent surrendering the certificates for the two plots the subject of exchange agreement.
  21. The 1<sup>st</sup> Respondent further pleaded that in addition to the exchange of the plots, he paid a sum of Kshs. 200,000/= to the Appellant which was a term of the exchange agreement.
  22. The 1<sup>st</sup> Respondent therefore Counter-claimed against the Appellant for:
    - a. An order of declaration that the 1<sup>st</sup> Defendant is the legal and indefeasible owner of the suit property; Nrb/Block 126/353/016 to the exclusion of the plaintiff and other persons claiming adverse interest therein.
    - b. An order of declaration that the title held by the plaintiff in respect of the suit property namely Nrb/Block 126/353/016 is null and void ab initio and incapable of conferring on the plaintiff any proprietorship rights and interests over the suit property.
  23. At the hearing each side called 1 witness. The plaintiff testified on his own behalf whereas the 3<sup>rd</sup> Respondent herein testified on behalf of the Defendants (Respondents).
  24. The Plaintiff in his testimony restated his case by adopting his witness statement dated 23<sup>rd</sup> August, 2019. Concerning the land exchange agreement of 14<sup>th</sup> October, 2014, the plaintiff termed it a forgery.



25. On his part the defense witness David Mwai Kiragu adopted his witness statement dated 29<sup>th</sup> October, 2019. The witness who is a son of the 1<sup>st</sup> Respondent confirmed the agreement for exchange of land between the Appellant and the 1<sup>st</sup> Respondent. He had witnessed the same being executed by the parties. He was listed as one of the witnesses in the land exchange agreement.
26. It was the testimony of the Defence witness that upon executing the exchange agreement, both parties took possession and occupation of the respective parcels of Land as set out in the land exchange agreement. He testified that the 1<sup>st</sup> Defendant and his children have been in open, continuous and notorious possession and occupation of the suit property since the date of execution of the exchange agreement.
27. The 1<sup>st</sup> Defendant fulfilled his part of the agreement and handed over the Certificate of ownership of the property(s) exchanged to the Appellant. On the contrary, the Plaintiff failed to surrender to the 1<sup>st</sup> Defendant the Certificate of ownership of the suit property and it is on that basis that he was laying a claim of ownership of the suit property.
28. The Defence witness pointed out to the contradictions in the Appellant's case where the Plaintiff admits having acquired the ownership of plots NRB/BLOCK 126/50 and 51 by dint of the exchange agreement, which previously belonged to the 1<sup>st</sup> Defendant but fails to acknowledge that the consideration he gave for the exchange was plots No. NRB/BLOCK 126/353/16 & 19 under the exchange agreement.
29. The 1<sup>st</sup> Defendant has been paying the Land rates and rent due to the suit property since the execution of the exchange agreement to the date of his testimony before the trial court.
30. The trial Court in its judgment found that the exchange agreement met the threshold of an instrument for disposition of land under Section 3(3) of the *Law of Contract Act*. On the allegation by the Plaintiff that the exchange agreement was a forgery, the Learned Magistrate found that the Appellant had not pleaded the particulars of fraud in his plaint and since evidence must flow from the pleadings, the Court cannot make an inference and re-make a case for a party. The evidence by the Appellant that the exchange agreement was a forgery was not supported by the pleadings and was therefore baseless.
31. Regarding the Counter-claim by the 1<sup>st</sup> Defendant, the trial Court found in favour of the 1<sup>st</sup> Defendant having upheld that the exchange agreement was a valid instrument of disposition of an interest in Land.
32. The Appellant's grounds of appeal are essentially two. Grounds 1 and 4 are not specific. They merely fault the trial court only for dismissing the Plaintiff's suit.
33. Ground 2 in the Appellant's Memorandum of Appeal accuses the trial Court of ignoring the pleadings, both oral and documentary evidence and the submissions filed. Ground 3 on the other hand was an allegation that the trial Court considered issues that were neither pleaded by the parties in their pleadings nor adduced in their evidence.
34. From my analysis of the pleadings filed before the Magistrate's Court, the Appellant's case was grounded on the fact of him being the holder of the Certificate of ownership of the suit property. By virtue of being the holder of the Certificate of ownership of the suit property, the Appellant sought a declaration from the Court that he was the exclusive owner of the said parcel of Land.
35. I have re-evaluated the evidence presented before the trial court. In his witness statement filed alongside his Plaint, the Appellant referred to a fraudulent hand-written agreement that was allegedly given to him by the 1<sup>st</sup> Respondent purporting that the Appellant had transferred the suit property to the 1<sup>st</sup> Respondent in exchange with some other plots. The Appellant alleged that it was on the basis of that



fraudulent agreement that the 1<sup>st</sup> Defendant had trespassed and encroached into the suit property causing damage therein.

36. The allegations about the alleged fraudulent agreement were however not pleaded in the Plaintiff.
37. The Defendants filed a statement of Defence to the Plaintiff's case with a Counter-claim by the 1<sup>st</sup> Defendant as explained earlier on. Amongst the orders sought was one directing the 5<sup>th</sup> Defendant, Geostar Properties Company Ltd to cancel and revoke the Certificate of ownership held by the Plaintiff (Appellant) and issue a new one in favour of the 1<sup>st</sup> Defendant.
38. The 1<sup>st</sup> Defendant in his evidence produced the agreement of exchange dated 14<sup>th</sup> October, 2014 in support of his Counter-claim. The Agreement was duly executed by the parties and was also witnessed by amongst other people, the Senior Assistant Chief, Ngundu Sub-location, Kamulu Location. The Appellant too signed the said agreement. DW1 testified that he saw the Appellant and the 1<sup>st</sup> Respondent sign the land exchange agreement.
39. The Appellant's allegation that the agreement produced by the Defence was a forgery was not supported by any material evidence. I have keenly perused the proceedings before the trial Court. The Plaintiff did not expressly deny his signature on the agreement produced by the Defendant. He merely alleged that the agreement was false and manipulated.
40. The Respondent produced before the Court the duly executed and witnessed agreement. The Appellant alleged that the same was a forgery. On the basis of that allegation the evidential burden of proof shifted to him and it was therefore incumbent upon him to produce evidence to prove the allegations of fraud.
41. It is trite Law that any allegations of fraud must not only be specifically pleaded but strictly proved. The Court of Appeal in the case of Kuria Kiarie and 2 others –versus- Sammy Magera [2018] eKLR, held that,

“The next and only other issue is fraud. The Law is clear and we take it from the case of Vijay Morjaria vs. 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, off 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.”

42. As regards the standard of proof of fraud, the Court of Appeal in Kinyanjui Kamau vs. George Kamau [2015] eKLR stated that:

“It is trite Law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs. Ndolo [2008], 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”.

43. The Appellant did not prove the alleged fraud/forgery as per the law required. The trial court was justified in dismissing the Appellant’s case.
44. From the totality of the evidence presented before the trial Court, the 1<sup>st</sup> Respondent on his part proved his Counter-claim of on a balance of probabilities.
45. Having considered the entire pleadings and evidence presented before the trial Court, I find no reason to disagree with the findings of the trial Court. The Appellant has not proved any of the grounds of appeal and the Court finds no merit in this appeal. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Muteti for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

N/A by the Appellant and the 2<sup>nd</sup> Respondent

Yvette: Court Assistant

**M.D. MWANGI**

**JUDGE**

