



**Njagi v Kariuki & 3 others (Environment and Land Appeal
E029 of 2022) [2024] KEELC 4790 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E029 OF 2022
FM NJOROGE, J
JUNE 19, 2024**

BETWEEN

JOSEPH MUCIIMI NJAGI APPELLANT

AND

STEPHEN KARIUKI 1ST RESPONDENT

**THE LAND ADJUDICATION & SETTLEMENT OFFICER MAGOGONI- LAMU
COUNTY 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

THE LAND REGISTRAR LAMU COUNTY 4TH RESPONDENT

*(Being an Appeal from the entire Judgment and Decree of Honourable M.M.
Wachira, Senior Resident Magistrate in Lamu SRMCC No. 13 of 2019
Stephen Kariuki vs Joseph Muciimi Njagi delivered on 15th July, 2022)*

JUDGMENT

1. The Appellant being aggrieved and dissatisfied by the Judgment and Decree of the Learned Principal Magistrate M.M. Wachira delivered on the 15th July, 2022 in PMCC No. 13 of 2019 Stephen Kariuki Vs Muciimi Njagi appeal to this court on the following grounds:
 - a. That the Learned Trial Magistrate erred in law and in fact in holding that the 1st Respondent is the registered proprietor of the suit property;
 - b. That the Learned Trial Magistrate erred in law and in fact in holding that there was no evidence to prove that the title of the 1st Respondent was obtained through fraud or misrepresentation;
 - c. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellant is a trespasser on the suit property;



- d. That the Learned Trial Magistrate erred in Law and in fact in holding that the Appellant failed to prove his case against the Plaintiff in the counterclaim to the required standards;
 - e. That the Learned Magistrate erred in both Law and fact by failing to find that the Appellant's evidence on Appellant's counterclaim was uncontroverted;
 - f. That the Learned Trial Magistrate erred in Law and in fact in dismissing the Appellant's case in total disregard of the Appellant's evidence;
 - g. That the Learned Magistrate erred in Law and in fact by failing to consider the Appellant's submission and evidence in toto;
 - h. That the Learned Magistrate erred in Law and in fact in holding that there was no evidence to prove that the certificate of the title by the 1st Respondent was acquired illegally, unprocedurally or through a corrupt scheme.
2. The Appellant prays that:
- a. The appeal be allowed and the entire Judgment of Hon. M.M. Wachira Principal Magistrate delivered on the 15th July, 2022 be set aside.
 - b. The Honourable Court do assess the evidence on record and enter a Judgment in favour of the Appellant.
 - c. Costs be awarded to the Appellant.
3. The appeal arises from a suit filed by the respondent against the appellant in the Principal Magistrate's court in Lamu vide a plaint dated 27/11/2019 in which the respondent claimed that he was the registered proprietor of the land known as Hindi/Magogoni/598 which the appellant had allegedly trespassed on from the year 2018 and on which he still was in occupation of by the time of filing suit. The respondent sought a permanent injunction, eviction orders general damages for trespass and costs.
4. The appellant filed a defence dated 5/3/2020 in which he denied the whole claim and averred that he had been in actual occupation thereof since 2003. He claimed that he owned the land in absolute and that it was the only home he and his family know and that the respondent had obtained title thereto irregularly and fraudulently. He prayed that the respondent's suit be dismissed with costs. The defence was amended on 18th August 2020 to include a counterclaim in which the appellant joined the respondent, the County Land Adjudication and Settlement Officer, the Attorney General and the Land Registrar Lamu County as the 1st -4th defendants respectively. He reiterated the matters in the defence in the body of the counterclaim and added that he was legally and beneficially entitled to the suit land; that in 2003 he apprised the government through the Settlement Officer, Hindi, of his need to be settled firmly on the suit land; that he was then issued with a letter of allotment by the Director Of Land Adjudication and Settlement but was never considered; that the respondent has never been a resident of the area and so was not eligible for consideration for allocation of the suit property; that however as he awaited a title in his name he learnt that the respondent, who was a government official, had been clandestinely and fraudulently allocated the land and issued with title thereto. The appellant's protests to the Chief Land Registrar against the allocation failed to bear fruit. He avers that owing to illegality and fraud in the acquisition process the 1st respondent never acquired any legal title to the suit land. The particulars of fraud, illegality and misrepresentation were set out in the counterclaim.
5. Parties filed submissions before the lower court and Judgment was entered for the Respondent against the Appellants on 15th July 2022 in the following terms:



- a. A permanent injunction to restrain the Appellant from entering or remaining using and claiming the suit land.
 - b. An order of eviction of the Appellant from the suit land
 - c. General damages for trespass being Kshs 50,000/-
 - d. Cost of the suit.
 - e. The Counter claim was dismissed with no orders as to costs.
6. In the Judgment the trial court framed the following issues for determination:
1. Whether the Plaintiff is the duly registered proprietor of the suit land;
 2. Whether the registration of the Plaintiff was done fraudulently or illegally;
 3. Whether the Defendant had trespassed on the suit land and if damages should be awarded;
 4. Whether the Defendant has proved his Counterclaim;
 5. Who bears the cost of the suit and the counterclaim?
7. When the appeal came before this court it was ordered it be disposed by way of written submissions. The Appellant filed submissions on 28th December, 2022 while the Respondent filed submissions on 24th July, 2023.

The Appellant's Submissions

8. The Appellant framed three issues for determination;
- a. Whether the 1st Respondent is registered proprietor of the suit land;
 - b. Whether the creation of the 1st Respondent title was in accordance with the applicable law, process and procedure;
 - c. Whether such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, process, procedure and the public interest.
9. The submissions of the appellant analyzed the evidence at the lower court and asserted that the Respondent when asked to explain how his title was procured and why his discharge and registration of transfer were dated the same date, and why his transfer was booked on 28th May 2010 when his title was dated 27th May 2020 he had no answer to those questions.
10. The appellant also submitted that despite service the Attorney General's Office never appeared or took part in the proceedings and it should be presumed that he failed to do so to avoid embarrassment on the legion irregularities in the manner in which his clients dealt with the dispute.
11. While addressing the irregularities in the process of the acquisition of the respondent's title, the Appellant relied on Joyce Mutete Mawioo vs Pauline Wanjiru Ngángá & 4 Others 2020 EKRL Munyu Maina vs Hiram Gathiha Maina 2013 eKLR and Joseph Kinyanjui Wanjiru vs Sila Mureithi Guchu & 2 Others [2020] EKLRL among other cases. He concluded by stating that the fact that the Appellant did not avail any witness or neighbour who could have assisted to prove that he had been in occupation of the land before it was allocated to the 1st Respondent should neither be fatal nor be held as the deciding fact with regard to evidence of settlement when none was produced by the Respondent to rebut the



Appellants claim of occupation. For this he relied on *Rosa Tala Chepkongor vs Daniel Cherogony* [2022] eKLR saying that in that case the defendant did not avail any witness to prove his occupation but the court nevertheless took notice of his occupation.

12. The Appellant finally stated that this court is the last resort in land adjudication matters.

The 1st Respondent's Submissions

13. The 1st Respondent submitted that on the issue whether the Judgment rendered by the Learned Trial Magistrate was sound, the court correctly applied the law particularly Section 26 of the *Land Registration Act* 2012 on the acceptability of a certificate of title has prima facie evidence that the person named as proprietor is the absolute and indefeasible owner in the absence of any material evidence to the contrary; that there was no evidence of impropriety presented by the Appellant; that the Appellant did not avail any witness or neighbour who could have assisted him prove that he had been in occupation of the suit property before the 1st Respondent acquired title over the same; that no evidence of fraud, misrepresentation or corrupt scheme was presented to necessitate the nullification of his title and that the learned trial Magistrate rightfully held that as long as the Respondent's title has not been invalidated, the admission by the Respondent that he has occupied the suit property without the 1st Respondent's permission amount to trespass to land which entitled the 1st Respondent to damages. He cited the case *Park Towers Limited vs John Mithamo Njika & 7 Others* [2004] eKLR.
14. Citing *Serah Mweru Muhi vs Commissioner of Land & 2 Others* [2014] eKLR the Respondent averred that the present appeal is an abuse of the process of the court and that Article 40 (1) enjoins the Court to promote and protect the property rights of a lawful proprietor and the court cannot follow a path sought by a party when the same is either unsupported to the required threshold or would otherwise infringe upon another's legal rights.
15. Citing *Muchanga Investment Limited vs Safaris & Limited (Africa) Limited & 2 Others* [2009] eKLR the Respondent submitted that the Appeal is an academic exercise and he sought that it be dismissed with costs.

2nd -4th Respondents Submissions.

16. The 2nd -4th respondents never filed any submissions to the appeal, but on 29/1/2014 when Mr. Munga appeared in the matter he indicated that they would rely on the submissions filed in the trial court.

Analysis and Determination.

17. I have examined the grounds of appeal and they can be congealed into the following:
 - a. Whether the learned trial magistrate erred in law and in fact and failed to consider the appellant's submissions;
 - b. Whether on the strength of the adduced evidence the learned trial magistrate erred in law and in fact in holding that the appellant failed to prove his case of fraud and misrepresentation in the process of obtaining title to the suit land against the 1st respondent to the required standard;
 - c. Whether the learned trial magistrate erred in law and in fact in holding that the appellant is a trespasser on the suit premises.
18. Regarding the first issue the court notes that a cursory examination of the judgment would tell if the trial court took into consideration the submissions of the appellant. It is critical to note that at page 3



of its judgment the court observed that the parties framed their own issues for determination. It stated as follows:

“The court frames the following issues for determination from the pleadings and the submissions.”

19. At this juncture the court must caution that it is not mandatory that the court replicates word for word all the submissions of the parties or any of them in its judgment or ruling. All that suffices is that the court has read and considered them. The court may peruse and owing to its different perspective on the matter fail to evince any signs of having read the same though it is aware of the principles relied on therein. Besides, the role of submissions is to bring notice of certain facts and laws to the court’s attention which it can not be presumed that the court was not aware of. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR held as follows:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

20. The Court in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007 as was cited in *Benson W. Kaos & 72 others v Attorney General & 85 others* [2022] eKLR held as follows:

“...regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests’ attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon.”

21. In the present case, it is apparent from the statements made by the court as observed herein it must have considered the appellant’s submissions even though it ended up ruling in favour of the respondent and it can not thus be faulted. For that reason, the said ground fails.

22. On the second issue, this is a first appeal and the rule in *Selle Vs. Associated Motor Boat Company*, [1968] E.A. 123 applies, to wit, that

“..... this Court must reconsider the evidence, evaluate 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 that respect...”

23. It is vital that at all times litigants must be aware that the burden of proof lies on the allegor. The respondent alleged that he was the registered proprietor of the suit land and proved it by producing the title document. As was stated in the appeal case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR where the validity of a title document has been challenged it is incumbent on the holder of that



document to demonstrate that it was obtained procedurally and legally. The court in the case delivered itself thus:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

24. In this dispute the title was in the name of the respondent who was the plaintiff in the court below. When the counterclaim was therefore lodged it behoved him to be aware of the demand made upon him to present, before the appellant prosecuted his defence, evidence to show that he had obtained the title legally. His evidence would be weighed against appellant’s for the court to conclude as to whether or not his title ought to be nullified. It is this evidence of the parties in the present dispute as adduced in the court below that this court must analyze in accordance with the rule in the *Munyu Maina* case (*supra*.)
25. In the lower court, the evidence of the respondent with regard to his acquisition of the suit title was as follows: in 2009 he wrote to the government and subsequently vide a letter dated 10/11/2009 (P. Exh 1) he was offered the suit land on certain conditions; he confirmed that the land was vacant and paid the required fees and was issued with a discharge of charge dated 7/5/2010 (P. Exh 2). The transfer (P. Exh 3) was registered in his name on the same date on the discharge of charge. He paid the required fee and was issued with the title deed. For lack of funds he took time before developing the land but he finally began doing so in 2018. Without stating the exact date on which he did so, he got information that someone was occupying his land without his permission and he sent the chief to ask him to vacate but it was in vain. His advocate then issued a demand letter and later on the suit was filed in the lower court. When cross examined by Ms Waithera for the appellant as to why the title was issued before the date the transfer was booked for registration his retort was that he was not involved in the process of title issuance in the land registry. He admitted that the process of transfer and discharge took only one day. He testified alone in his case.
26. On the other hand, the appellant gave evidence and stated that he had been carrying on farming on the disputed land on which he also lives; that when he entered and occupied the land, it was still government land; that he went to a Settlement Officer, Mr. Peter Kirothi, seeking an allocation; 90 days after that visit he returned to the same office and Peter wrote a letter on his behalf; Peter used to visit the suit land; however in 2006 the title to the suit land was issued in the name of the respondent. The appellant lodged a complaint. On May 25th 2010 the appellant was summoned by Peter. He showed him land that was vacant and said that they would sell it. Later after 2 days’ Peter called the appellant and told him that the land was in the name of one Stephen Kariuki who was abroad then; the appellant went to see the County Commissioner, a Mr. Ikua; however, an MCA informed him that Mr. Ikua was the Mr. Stephen Kariuki who had been registered as the proprietor of the suit land. He was informed that Mr. Ikua had applied for, and been allocated, the land. He went to the National Land Commission, the Anti-Corruption and the DPP to forward his complaint but he has never received any response from those offices to date. He stated that he was in occupation of the land by the time Mr. Kariuki was registered as the owner of the land and he should have been considered on priority to Mr Kariuki for that reason. Her alleged that a second title deed in the name of Stephen Kariuki was issued.
27. Upon cross-examination by the plaintiff’s counsel he stated that the respondent had never allowed him to be on the land; that he was not aware that the respondent had been issued with a letter of offer by the



government; that he has no letter from the Settlement Office informing him that the land was vacant; he never paid any money to the settlement office; that he is not aware whether the respondent paid any money to the settlement office; that he was also unaware whether the police had investigated the respondent's title. On re-examination he set out his wish that the court do visit the suit land to witness his alleged developments thereon. At that juncture the defence case and the counterclaimant's case were closed and a time frame was issued for the filing of submissions which this court has addressed as above.

28. The question that this court is now to address is whether on the strength of the evidence adduced as set out herein above, the learned trial magistrate erred in law and in fact in holding that the appellant failed to prove his case of fraud and misrepresentation in the process of obtaining title to the suit land against the 1st respondent to the required standard.
29. I will compare the evidence of the two parties and come up with the conclusion shortly.
30. Section 26 of the [Land Registration 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

31. The evidence of the parties brings to the surface the fact that the land was distributed by the Settlement Office. Indeed, the letter dated 23/5/2019 from the County Land Registrar Lamu to the Chairman National Land Commission states that:

“The acquisition of title was done through the Department of Land Adjudication and Settlement, the area being an adjudication section.”

32. A title issued in respect of land in a Settlement Scheme, and any other title, is the end product of a process. It is the question as to whether the steps in this process have been scrupulously followed by the title holder in acquiring his title that must be answered in the positive in order for the title to be declared valid. Consequently, the ordinary course that any one of the parties, or both, should have taken at the hearing in establishing that their respective claims to the suit land was valid was to call in evidence of the process that was followed in allocating the land not only to the present parties but also to members of the public. I state this because though there is a legal process that stipulates how



the demarcation and allocation of settlement scheme land ought to be conducted, salient features of various schemes may differ. It was upon the parties therefore to demonstrate how each came to claim the land. In this regard the evidence of the County Land Adjudication and Settlement Officer would have been crucial. Unfortunately, the court was not given a chance to hear that kind of evidence and it had to draw conclusions from the evidence of the parties.

33. The issue that arises in the absence of evidence from the Land Adjudication and Settlement Officer is whether that evidence presented by the parties was so inadequate as to disentitle the court from coming to a conclusion that the land was rightfully the respondent's.
34. Of the two parties before the court, the respondent presented a clearer picture of what transpired. He produced a letter of offer dated 10/11/2009 while the appellant had none. The importance of that document can not be underestimated as it marks the commencement of the process of issuance of title. He also produced a copy of a transfer in his favour dated 7/5/2010 and a discharge of charge dated 7/5/2010.
35. On the other hand, the appellant lacked any transfer and discharge. The respondent also produced a copy of the title issued to him. Although the respondent could not explain properly what occasioned the discrepancies in the dates of presentation of the transfer and the date on the title, this court can clearly see that the date of presentation of the transfer is the same date of the issuance of title, which means that the title was issued on the same date the transfer was executed in the respondent's favour by the Settlement Office, that is 27/5/2010 in both instances. The data appearing on the second column at the top of the transfer is a mere presentation book number, otherwise known in conveyancing parlance as "day book number" and has no relevance to the date of presentation in this particular case and no concern has been raised in connection thereto. The date of presentation of transfer in Registered [Land Act](#) transactions is the date of registration and it appears on the end product of the registration process in the event the document sought to be registered is not rejected midstream the process.
36. In the present case it would appear that the transfer and the discharge were lodged on the same date in quick succession with the discharge coming first as day book number 27-5-2010 and the transfer as daybook number 28-5-2010 and this is normal as the land had to be discharged first prior to registration of title.
37. Stamp duty appears to have been assessed and paid for there are assessment details and revenue stamps appearing on the face of both documents. According to his official stamp affixed on the last page. The transfer is attested to by the District Land Adjudication and Settlement Officer, Lamu. There is no endorsement that it was registered, but equity regards as done that which ought to have been done, and the court is entitled to presume, upon production of the title deed to the suit land and which was produced at the trial, that this was an extra counterpart copy that was not so endorsed, and that the production of the title deed is evidence of registration of its executed counterpart. The appellant was not able to demonstrate by his evidence at the hearing before the lower court that these discrepancies were intentional or went to the root of the process of issuance of title so as to invalidate and render the process illegal or irregular or that they were prejudicial to him. Besides, there is a demand letter written by the respondent's advocate on 27/2/2019 alleging that the appellant was allocated another plot, numbered 511, and not the suit land. In his oral evidence the appellant was mute regarding those allegations, but a scrutiny of his documents reveal that his letter dated 21/9/2015 to the National Land Commission admitted that he had been allocated Plot No 511 Lake Kenyatta Phase II Settlement Scheme jointly with one Mrs. Agatha Nyaruai Gichuki, though the circumstances whereof are not made clear.



38. The appellant's case is that he had occupied the suit land before it was allocated to the respondent and that he had also developed the same and on that basis his claim to the land ranked in priority to the respondent's. However, his oral evidence that he had occupied and developed the land, which position appears to have been set out in his letter dated 14/10/2016 to the Commission on Administration of Justice, was not corroborated by any other oral, documentary or pictorial evidence which he had the opportunity to present at the hearing. His documentary evidence was mainly comprised only of complaints to numerous offices and this must have been quite unhelpful to the trial court, just as it is to this court now. There was not even an application for allocation produced to support his claim that he had asked the Settlement Office for allocation. There is no competing or parallel allocation process regarding him that can be compared to that of the respondent in determining if there was fraud. If he had never applied for the land, there is no way in which he could have otherwise triggered off the allocation process.
39. Fraud must be pleaded and proved (see: Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others [2013] eKLR.) Proof of fraud must be above balance of probabilities but not beyond reasonable doubt. In the case of Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR it was held as follows:
- “As was stated in R. G. Patel Vs Lalji Makanji (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities.”
40. In this case I find that the appellant claimed fraud, pleaded fraud but gave evidence that fell far short of establishing that any or all of the respondents had committed fraud. That the respondent is admittedly a powerful government functionary per se is no evidence of fraud illegality and misrepresentation. If every citizen were taken at their word that they have lost land at the hands of powerful government officials to nullify the latter's title without any other evidence, very few administrators would lay claim to title to any land in this nation. To prevent this injustice every claim must be tried on sound evidence of fraud illegality and misrepresentation, and according to Section 107 of the *Evidence Act*, the allexer proves.
41. From the foregoing analysis, the court's conclusion regarding the second issue is that the Learned Trial Magistrate was correct in failing to find that on the basis of the evidence adduced by the appellant that had proved fraud illegality and misrepresentation against the respondent at the trial.
42. Lastly is whether the learned trial magistrate erred in law and in fact in finding that the appellant was a trespasser on the suit land. In this regard it must be stated that the trial court having found that the appellant lacked title to the land and the respondent having established that he was the registered proprietor thereof, there had to be evidence of a licence or permission or even a lease, employment or any other agreement between the appellant and the registered owner which could legalize his occupation of the land. This was not the case and the appellant's claim throughout has been that he owns the suit land, having been in alleged occupation before its allocation to the respondent. Section 25 of the *Land Registration Act* provides as follows:
- “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, charges 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.”

43. I have not found any proof of any interests or encumbrances over the suit land in favour of the appellant that would have enabled the trial court withhold a declaration that he is a trespasser on the respondent’s land. The Learned Trial Magistrate was correct in pronouncing the appellant a trespasser.

44. The upshot of the foregoing is that the appeal herein fails on all its enumerated grounds and is hereby dismissed. However, each party will bear his own costs of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 19TH DAY OF JUNE 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

